Supreme Court, U. S.
FILED
JUL 21 1975
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1975

No. 75-119

KIMBERLY-CLARK CORPORATION,
Petitioner,

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
Respondent.

PETITION FOR WRIT OF CERTIORARI

To the United States Court of Appeals for the Sixth Circuit

J. FRASER HUMPHREYS, JR.
ALEXANDER W. WELLFORD, JR.
LAWLER, HUMPHREYS & DUNLAP
1500 First National Bank Building
Memphis, Tennessee 38103

J. LEONARD SAMANSKY
LIPKOWITZ & PLAUT
1290 Avenue of the Americas
New York, New York 10019

Attorneys for Petitioner, Kimberly-Clark Corporation

Of Counsel:

THOMAS M. STANTON
EDWARD E. WALL
Kimberly-Clark Corporation
Neenah, Wisconsin 54956

St. Louis Law Printing Co., Inc., 812 Olive Street 63101 314-231-4477

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KIMBERLY-CLARK CORPORATION,
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EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
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PETITION FOR WRIT OF CERTIORARI

To the United States Court of Appeals for the Sixth Circuit

Petitioner, Kimberly-Clark Corporation, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit entered on February 14, 1975, which reversed the judgment of the United States District Court for the Western District of Tennessee.

OPINIONS BELOW

The opinion of the Sixth Circuit, reported at 511 F. 2d 1352, is reproduced in the Appendix (p. A-1). The opinion of the District Court, reported at 380 F. Supp. 1106, is reproduced in the Appendix (p. A-24).

JURISDICTION

The judgment of the Court of Appeals was entered on February 14, 1975. A timely petition for rehearing was denied on April 23, 1975, and this petition for certiorari has been filed within 90 days of that date. A copy of the order denying the petition for rehearing is in the Appendix (p. A-36).

Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Whether the Equal Employment Opportunity Commission (the "EEOC") may commence a duplicitous suit based on charges raising the same issues of employment discrimination as in a previously commenced class action suit under Title VII?

2. Whether petitioner has been denied due process of law by the EEOC's failure to comply with the notice, conciliation, and determination of reasonable cause requirements of the Equal Employment Opportunity Act of 1972 (the "1972 Act") and its own Regulations?

3. Whether the EEOC may bring suit on a charge which it had processed before the 1972 Act became effective?

4. Whether suit by the EEOC is barred by the 1972 Act time limitations, by a state statute of limitations, or because charges were not timely filed under the Act?

STATUTES AND REGULATIONS INVOLVED

The statutory provisions involved are Sections 706(b) and 706(f)(1) of Title VII of the Civil Rights Act of 1964, as amended by the 1972 Act [42 U.S.C. §§ 2000e-5(b) and (f)(1)], Section 14 of the 1972 Act [Pub. L. No. 92-261, § 14 (Mar. 24, 1972) 86 Stat. 103], and Section 706(d) of Title VII of the Civil Rights Act of 1964, prior to amendment [Pub. L. No. 88-352 (1964) 78 Stat. 260]. The text of these statutory provisions is set forth in the Appendix (p. A-37).

The relevant EEOC Regulations are §§ 1601.19, 1601.19a, 1601.19b, 1601.19c and 1601.19d [35 Fed. Reg. 3163, 10110 (1970)]; §§ 1601.1, 1601.22, and 1601.23 [29 C.F.R. §§ 1601.1, 1601.22, and 1601.23]; § 1601.25 [30 Fed. Reg. 8409 (1965)]; and § 1601.25a [35 Fed. Reg. 3164, 10110 (1970)]. The text of these Regulations appears in the Appendix (p. A-40).

STATEMENT OF THE CASE

The EEOC commenced this suit on February 2, 1973, under the 1972 Act. The allegations of racial discrimination were based on a single charge (the "Munn charge") which was already the subject of a separate pending class action. The bulk of the charges upon which the allegations of sex discrimination were based (the "Meek group charges") had been previously settled pursuant to EEOC predecision settlement procedures under its Regulations. The EEOC had not given the "last chance" notice required under its Regulations with respect to these or any of the other charges. EEOC Reg. § 1601.23. Each of the charges had been investigated and processed by the EEOC before the 1972 Act became effective on March 24, 1972.

1. The 1971 Charges

The Meek group charges, filed with the EEOC between January and June of 1971, contained virtually identical allegations of sex discrimination—the loss of service credit during layoffs which had occurred over five years before the charges were filed; no determination of reasonable cause has ever been issued.[1] (A. 61-92, 168). The Dunavan charge, also filed in 1971, alleged sex discrimination concerning female oilers at petitioner's Memphis mill; the EEOC issued a determination of reasonable cause on August 17, 1971.[2] (A. 93, 112).

While the EEOC was investigating the Meek group charges, petitioner submitted to the EEOC a statement on July 23, 1971 showing not only that the charges involved matters which had been previously litigated and settled but also that the charges were untimely filed since they had been filed more than 90 days after the loss of service credit had occurred in 1965 and 1966 as a result of layoffs.[3] (A. 263).

Upon completion of its investigation of the Meek group charges on October 4, 1971, the EEOC sent petitioner a

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[1] References to the Joint Appendix used in the Court of Appeals, which has been certified to this Court at petitioner's request, will be set forth as "A. ...."

[2] Investigation of the Dunavan charge was completed by June 23, 1971, when the EEOC issued findings of fact, to which petitioner filed exceptions. (A. 189, 112).

[3] The issues raised by the Meek group charges had already been the subject of class action litigation under Title VII based on prior EEOC charges filed by the Meek group, among others. Cooper v. Kimberly-Clark Corp., Civil Action No. C-66-251, W.D. Tenn., Sept. 1, 1966. (A. 229, 239, 249, 284). The Cooper class action had been settled and adjudicated on the merits on December 8, 1967, with a monetary payment in full satisfaction of all claims arising out of the 1965 and 1966 layoffs. (A. 260, 284). The Meek group were all members of the class in that litigation. (A. 229, 258, 259, 284).

copy of its Regulations, its findings of fact, and notified petitioner that it could file exceptions to the findings of fact and invited petitioner to enter into predecision settlement discussions. EEOC Reg. § 1601.19c. (A. 176, 185). The letter stated, "Should negotiations be concluded satisfactorily, no Commission decision would issue and further proceedings under Title VII would be avoided." (A. 185, 186).

Pursuant to the Regulations, petitioner filed exceptions and, even though there had been no determination as to reasonable cause, began informal settlement discussions with the local union, which was one of the Meek group charging parties. (A. 207, 208). As a result of the predecision settlement discussions, petitioner, local union, the Meek group, and all other employees similarly situated entered into a written settlement agreement which granted all relief requested—service credits for the 1965-66 layoffs. (A. 49, 122, 142). Each Meek group charging party also executed a request addressed to the EEOC that her charge be withdrawn, stating that all pending differences with petitioner had been settled. (A. 49, 131-141).

Although the EEOC admits that it had been fully aware of the terms of the settlement before the agreement was signed (A. 158, 159) and has never objected to it, the EEOC on December 4, 1972 sent a letter to counsel for petitioner which referred to both the Meek group and Dunavan cases, ignored the settlement agreement, and stated in part:

> The Commission feels that too much time has elapsed *without an affirmative effort* by the Respondent *to resolve the issues* in these cases. Since it is felt that further delays will not be productive, the Commission is *terminating its efforts to conciliate* these cases effective on the date of this letter.
>
> (A. 187, 188) (emphasis added)

This letter failed to give the "last chance" notification required by Section 1601.23 of the Regulations. The wording of the letter, almost identical to the first sentence of Section 1601.23, failed to state that petitioner could request that conciliation efforts be resumed or to specify any time period during which it could do so. Furthermore, as to the Meek group charges, the EEOC had failed to follow the steps required under its own Regulations; it had not made a determination of reasonable cause or dismissed the charges.[4] (A. 48, 208, 286).

Counsel for petitioner assumed the EEOC was unaware of the settlement, and after responding by telephone to the EEOC's notification, wrote a letter to the EEOC on January 9, 1973 confirming that the service dates had been adjusted as requested and enclosing withdrawal of charges request forms signed by each member of the Meek group. Counsel thanked the EEOC for having helped resolve the issues (A. 142, 143).

Rather than responding to the letter or objecting to the settlement, the EEOC three weeks later instituted this suit. (A. 158, 159, 164, 165).

2. **The 1968-69 Charges**

The Williams group-Johnston charges filed in 1968 and early 1969 alleged sex discrimination in promotion and overtime. (A. 51-60). When the EEOC made a determination of reasonable cause two years later, it contacted petitioner regarding conciliation discussions. (A. 102-111, 171, 174).

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[4] EEOC Regulations §§ 1601.19c and 1601.19d provided that if the informal predecision settlement discussions were unsuccessful, the file would be forwarded for determination, after which conciliation would take place only if reasonable cause was found. 35 Fed. Reg. 3163 (1970).

The conciliation consisted solely of a letter mailed to petitioner by the EEOC on May 4, 1971, enclosing for review proposed conciliation agreements. (A. 163, 173). By that time through the actions of petitioner, the issues had long since been resolved (A. 49), and on May 21, 1971, petitioner responded with a letter which stated:

> It is our belief that actions taken by respondent to date basically resolve the issues involved. Consequently, we have concluded that signing the proposed conciliation agreements is unnecessary and would serve no further purpose.
>
> (A. 120)

Although the EEOC then notified the charging parties—but not petitioner—that conciliation efforts had failed, the EEOC has never taken exception to petitioner's statement that the issues were resolved nor has it ever issued any "last chance" notification to petitioner pursuant to the EEOC Regulations or otherwise. (A. 49). When the EEOC filed suit in February of 1973, it had then been over a year and a half since the EEOC's last action with regard to the charges. (A. 162-164).

3. The 1969 Charges of Racial Discrimination

The Munn charge filed in 1969 is the sole charge of racial discrimination upon which this suit was based. (A. 97-101, 119). Investigation of the charge was completed by September 21, 1970, and the EEOC issued findings of fact, to which petitioner filed exceptions. (A. 166, 193, 116).

A year and a half later, on May 15, 1972, the EEOC dismissed the allegations of discrimination in recruitment and hiring and the seniority system but found reasonable cause

to believe discrimination had occurred in promotion and job classification only. (A. 116). By letter dated June 6, 1972 accompanying the determination, the EEOC stated a conciliator would "propose a written conciliation agreement." (A. 195). No such agreement has ever been proposed. (A. 167).

Pursuant to a notice of the right to sue issued by the EEOC at Munn's request, Munn filed a class action under Title VII on August 31, 1972.[5] (A. 49, 144, 197, 270). The EEOC made two telephone calls to counsel for petitioner to inquire about the possibility of conciliation, but took no further action after the class action was filed, and issued no "last chance" notice under EEOC Regulations or otherwise. (A. 167).

No attempt was made by the EEOC to intervene in the Munn class action; instead the EEOC filed this suit which contains virtually identical allegations of racial discrimination (A. 274, 275). Months after petitioner's motion for summary judgment had been argued, the EEOC filed a motion to consolidate this suit with the existing class action. (A. 270). The Munn class action is still pending.

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[5] EEOC Regulation § 1601.25a(d) provided that issuance of the notice of the right to sue shall suspend further EEOC proceedings unless the field director determines that it is in the public interest to continue such proceedings. 35 Fed. Reg. 3164 (1970). The record shows no such determination.

REASONS FOR GRANTING THE WRIT

As the Sixth Circuit recognized, this case "presents several procedural questions of importance" to the EEOC and those bringing and defending charges filed with the EEOC. 511 F.2d at 1353. The Sixth Circuit's decision is based upon a misreading of this Court's decision in *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792 (1973) and a fundamental misunderstanding of the differences between the prerequisites for and proper scope of an EEOC suit and those of a charging party's action under Title VII. The decision below decimates the statutory rights and due process protections of employers and unions under Title VII. Among the many disturbing results of the decision are:

(a) The EEOC may litigate in a separate action instituted against the same defendant the same issues raised in a class action previously brought under Title VII, whether the class action is still pending, already litigated, settled, or adjudicated on the merits.

(b) After issuing and publishing Regulations governing the procedures under the statute, the EEOC may then ignore them at will; it may sue regardless of whether it has ever made a determination of reasonable cause or followed the other mandatory requirements of Sections 706(b) and 706(f)(1) of the Act and its own Regulations.

(c) After determining that there is no reasonable cause as to certain issues raised by a charge, the EEOC may nevertheless institute suit raising the very issues it has dismissed.

(d) The EEOC without any time limitation whatsoever may continue to sue on stale charges, even those fully processed long before the effective date of the 1972 Act.

I

There is an irreconcilable conflict between the Sixth Circuit and the Eighth Circuit as to whether the EEOC, after a charging party has filed a Title VII class action pursuant to a right-to-sue notice, may file a separate action based upon the same charge as the pending class action. *EEOC* v. *Missouri Pacific R.R.*, 493 F. 2d 71 (8th Cir. 1974); *EEOC* v. *Cronin*, — F. 2d —, 7 FEP Cases 1258 (8th Cir. Apr. 23, 1974). The Sixth Circuit recognized this conflict when it "respectfully disagree[d] with the Eighth Circuit's conclusion." 511 F.2d at 1363 n. 15.

The Eighth Circuit in *Missouri Pacific* examined the statutory scheme and Congress' concern about duplicitous suits and held that "the statute cannot be read to warrant duplicitous lawsuits when both actions find their genesis in one unlawful employment practice charge" and that "once the charging party has filed suit pursuant to a 'right to sue' notice, the Commission is relegated to its right of permissive intervention." 493 F.2d at 74, 75.

The Sixth Circuit, on the other hand, held that the EEOC, after issuing a right-to-sue notice, may file a separate suit rather than seeking to intervene in the class action brought by the charging party based on the same charge. The Sixth Circuit renders the acknowledged Congressional intent that duplicitous proceedings be avoided almost meaningless by applying this mandate only in the rare situation "when the EEOC's action parallels that of the private party, raising no substantially different issues and seeking no relief *other than for the private party.*" 511 F.2d at 1363 (emphasis added). See *EEOC* v. *Huttig Sash & Door Co.*, 511 F. 2d 453 (5th Cir. 1975). Under the Sixth Circuit's analysis, when the charging party's suit is a class action, as in the case at hand, no EEOC suit would be duplicitous unless it was much narrower than the class

action—unless it sought relief solely for the charging party.[6]

The Sixth Circuit further rendered the concept of avoiding duplicitous suits meaningless when it held that the EEOC is not barred by res judicata or collateral estoppel where a charging party has sued and the suit has been settled or adjudicated on the merits. 511 F.2d at 1361. Under this reasoning, a charge is alive forever—unless the EEOC was actually a party to the action—regardless of the fact that the 1972 Act specifically gives the EEOC the first opportunity to sue by precluding the charging party from suing during the 180 day period after the filing of a charge. The alarming prospect for the courts, for employers, and for unions is that the decision gives the EEOC the authority to relitigate the thousands of Title VII class action suits to which it was not a party.

II

It is respectfully submitted that the Sixth Circuit incorrectly interpreted this Court's decision in *McDonnell Douglas Corp.* v. *Green, supra,* 411 U.S. 792; it misconceived the difference between suit by a charging party under Title VII and suit by the EEOC when it (i) held that the proper scope of an EEOC suit is determined by the scope of the investigation likely to result from a charge rather than by the scope of the reasonable cause determina-

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[6] In the present case, the Sixth Circuit is in error in stating that the EEOC suit encompassed allegations extending beyond the Munn class action complaint. Both the Munn charge and the Munn class action suit contained broad and general allegations of racial discrimination; the issues raised by the allegations and the relief sought in the EEOC suit and Munn class action are the same. Indeed, the EEOC suit should properly have been narrower than the class action, since the EEOC dismissed some of the allegations of the Munn charge, including that of discrimination in hiring.

tion, (ii) suggested that the EEOC might be allowed to sue under Section 706(f)(1) even if it failed to make a determination as to reasonable cause, and (iii) held that petitioner was not prejudiced by the lack of a "last chance" notice required by EEOC Regulations dealing with conciliating matters in which reasonable cause has been found. The logical conclusion of the Sixth Circuit's decision is that the conciliation requirements of the 1972 Act are mere procedural technicalities and that the EEOC could base a suit on a charge even after having found no reasonable cause or having dismissed that charge. The court's decision is contrary to the statute and the Congressional intent, and conflicts with decisions of the Eighth Circuit. *EEOC* v. *Hickey-Mitchell Co.*, 507 F.2d 944 (8th Cir. 1974); *Brennan* v. *Ace Hardware Corp.*, 495 F.2d 368 (8th Cir. 1974); *EEOC* v. *Missouri Pacific R.R., supra*, 493 F.2d at 74.

This Court has held in *McDonnell Douglas* that the absence of a reasonable cause finding cannot bar a Title VII suit by a charging party. 411 U.S. at 798. The charging party's right to sue is not restricted to those matters for which there was a finding of reasonable cause by the EEOC. The charging party may sue if the EEOC dismisses a charge. Congress made it clear that a charging party is not to be penalized by the derelictions of the EEOC and therefore may sue "where there is agency inaction, dalliance or dismissal of a charge." 118 Cong. Rec. 7168 (1972). This Court did not suggest in *McDonnell Douglas*, however, that these principles apply to an EEOC suit.

To the contrary, it is apparent from the statutory scheme that Congress did not intend that the EEOC sue after dismissing a charge. Under Section 706(f)(1) the EEOC may not sue unless it is "unable to secure . . . a conciliation

agreement acceptable to the Commission." A necessary part of this statutory prerequisite is a bona fide attempt at conciliation *after* a determination of reasonable cause pursuant to Section 706(b). *EEOC* v. *Missouri Pacific R.R., supra,* 493 F.2d at 74; *EEOC* v. *Louisville & N. R.R.,* 505 F.2d 610, 617 (5th Cir. 1974), *petition for cert. filed,* 43 U.S.L.W. 3572 (Apr. 15, 1975) (No. 74-1294); *EEOC* v. *duPont,* 373 F.Supp. 1321, 1333 (D. Del. 1974), *aff'd,* — F. 2d —, 10 FEP Cases 916 (3rd Cir. May 9, 1975); EEOC Reg. § 1601.22, 29 C.F.R. § 1601.22. If the EEOC dismisses a charge, the EEOC has nothing to conciliate or to litigate; it has nothing further to do except to notify the charging party of the right to sue.

The Sixth Circuit's misconception of the prerequisites for an EEOC suit leads the court to conclude that its doctrine in *Tipler* v. *duPont,* 443 F.2d 125, 131 (6th Cir. 1971) —that the scope of the complaint in a charging party's suit is "only limited to the scope of the EEOC investigation reasonably expected to grow out of the charge of discrimination"—is equally applicable to an EEOC suit. 511 F.2d at 1363. A review of the mandatory steps of Sections 706(b) and 706(f)(1) indicates clearly that the scope of an EEOC suit is determined by the scope of the reasonable cause finding. *EEOC* v. *duPont, supra,* 373 F.Supp. at 1336-1338. Only as to those matters for which reasonable cause has been found is there something for the EEOC to conciliate or perhaps litigate.

Although Congress in the 1972 Act created the EEOC's right to bring suit, it did so with the express limitation that "only if conciliation proves to be impossible do we expect the Commission to bring action in Federal district court to seek enforcement" 118 Cong. Rec. 7563 (1972). While noting this directive elsewhere in its opinion [511 F.2d at 1357], the Sixth Circuit ignores it when considering the failure of the EEOC to give the required "last chance"

notice under EEOC Regulation § 1601.23 as a mere technical error not prejudicial to petitioner.

The Sixth Circuit erroneously equated a notice of the failure of conciliation with the "last chance" notice. This holding violates fundamental due process rights of respondents and is contrary to the overriding purpose of the Act, which establishes a comprehensive scheme for resolving matters through voluntary compliance. Knowledge that an EEOC suit may be imminent is of no value when the respondent is left helpless to avoid the suit.

Here, the EEOC gave no "last chance" to petitioner prior to instituting this suit but merely announced that conciliation was being terminated immediately. Petitioner's response to the EEOC's letter was ignored. No chance was ever given to petitioner to modify the Meek group settlement, and thus avoid litigation. The EEOC never indicated that it thought the Meek group was entitled to different or additional relief. In fact, the merits of the charges had not been determined by the EEOC, and in view of the late filing of the charges and the previous adjudication of the same issues on the merits in *Cooper* v. *Kimberly-Clark Corp., supra,* petitioner properly expected that the EEOC would dismiss the charges.

The Sixth Circuit further held that the mere notice of failure of conciliation regarding one charge was a sufficient "last chance" notice regarding all charges upon which suit was based. Petitioner had no indication that the long dormant 1968-69 Williams-group charges were being resurrected or that the EEOC in any way disagreed with petitioner's statement that those issues had been resolved. Petitioner was given no indication that the EEOC desired to conciliate the Munn charge already being litigated in an existing class action. Never did the EEOC indicate

what action it desired in order to resolve the Munn, Dunavan, or Meek group charges.

By improperly resurrecting the Williams group charges, the EEOC increased the potential back pay liability of petitioner to hundreds of female employees in the mill by almost three years, since back pay liability is measured from two years prior to the filing of a charge rather than from the date suit is filed. *Albemarle Paper Co.* v. *Moody*, 43 U.S.L.W. 4880, 4882 n. 3 (U.S. June 25, 1975). Substantial prejudice is therefore present.

The Sixth Circuit's decision is in direct conflict with *EEOC* v. *Hickey-Mitchell Co., supra*, 507 F.2d 944 (8th Cir. 1974), which the court did not cite or make any attempt to distinguish. In *Hickey-Mitchell*, the court rejected the argument that failure to give the "last chance" notice was a mere technical error which did not prejudice the defendant and held that Regulation § 1601.23 "reflects formal recognition by the Commission of the need to keep the doors of communication open even where, as here, it has received a flat refusal to engage in conciliation discussions." 507 F.2d at 948.

The Sixth Circuit's decision with respect to the prerequisites for an EEOC suit and the lack of necessity for compliance with the Regulations is in conflict not only with the Eighth Circuit decisions in *Hickey-Mitchell* and *Missouri Pacific* but also with the decision of every district court considering these issues.[7] This conflict has been pre-

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[7] EEOC v. Raymond Metal Prod. Co., 385 F.Supp. 907, 926 (D. Md. 1974); EEOC v. Western Elec. Co., 382 F. Supp. 787, 796, 797 (D. Md. 1974); EEOC v. United States Pipe & F. Co., 375 F.Supp. 237 (N.D. Ala. 1974); EEOC v. duPont, *supra*, 373 F.Supp. at 1333; EEOC v. Westvaco Corp., 372 F. Supp. 985 (D. Md. 1974); EEOC v. Firestone Tire & Rubber Co., 366 F.Supp. 273 (D. Md. 1973); EEOC v. Container Corp. of Amer., 352 F.Supp. 262, 265 (M.D. Fla. 1972). *But cf.* EEOC v. Louisville & N. R.R., *supra*, 505 F. 2d 610.

sented in the pending petition for certiorari in *EEOC* v. *Louisville & N. R.R., supra,* 43 U.S.L.W. 3572 (Apr. 15, 1975) (No. 74-1294). The Sixth Circuit's decision is also in conflict with the Eighth Circuit's decision in *Brennan* v. *Ace Hardware Corp., supra,* 495 F. 2d 368, involving the virtually identical conciliation requirements under the Age Discrimination in Employment Act of 1967, 29 U.S.C. § 621 *et seq.* These important, recurring procedural and due process questions need to be resolved by this Court.

III

The Sixth Circuit's decision that the charges upon which this suit was based were "charges pending with the Commission on the date of enactment" of the 1972 Act within the meaning of Section 14 is inconsistent with Congressional intent, is contrary to the construction of the 1972 Act by the EEOC's own implementing Regulations, and makes the 1972 Act virtually retroactive to July 2, 1965.

When issuing amendments to its Regulations in 1970, the EEOC made them applicable to "charges presently pending" with the EEOC, and when questions arose as to the meaning of "charges . . . pending," the EEOC published a clarification in the Federal Register which stated:

> The unnumbered introduction states that this amendment "shall be applicable with respect to charges presently pending before or hereafter filed with the Equal Employment Opportunity Commission." Under internal Commission procedures, individual charges have been treated an[d] denominated as such until the completion of investigation (i.e., completion of the Final Investigative Report) at which time the matter is considered a "case" and a case number is assigned.

> Accordingly, the above quoted introductory statement was intended to make the amendment applicable only to "charges" as to which the investigation had not been completed prior to the effective date thereof, and not with respect to "cases" where the investigation had been completed.
>
> 35 Fed. Reg. 10110 (June 19, 1970)

When new Regulations were issued specifically to implement the 1972 Act, again they were made applicable to "charges presently pending"—making it clear that the EEOC considered the 1972 Act to be applicable only to charges that had *not* been investigated at that time. 37 Fed. Reg. 9215 (May 6, 1972); 37 Fed. Reg. 20165 (Sept. 27, 1972). On the other hand, when new sex discrimination guidelines not connected with the 1972 Act were issued, the EEOC made them applicable to "charges *and cases* presently pending" with the EEOC. 37 Fed. Reg. 6835 (Apr. 5, 1972) (emphasis added).

The investigation of all of the charges upon which this suit is based had been completed and an EEOC case number assigned long before the effective date of the 1972 Act. In its administrative interpretation of Section 14 in its Regulations, the EEOC has determined that the 1972 Act is not applicable to any such pre-1972 Act "charges" which had become "cases."

The administrative interpretation is consistent with the legislative history and is entitled to great deference. *Griggs* v. *Duke Power Co.*, 401 U.S. 424, 433, 434 (1971); *cf. Corning Glass Works* v. *Brennan*, — U.S. —, 94 S. Ct. 2223, 2231 (June 3, 1974). The Justice Department letter which prompted Senator Javits to introduce an amendment to make the 1972 Act applicable to "charges pending" indicated a desire to make the 1972 Act applicable to charging

parties who had "waited as long as 18 months to two years" for resolution of their charges. *EEOC* v. *Christiansburg Garment Co.*, 376 F. Supp. 1067, 1074 (W.D. Va. 1974); 118 CONG. REC. 4816 (1972). The letter must have referred to uninvestigated charges. According to the Annual Reports of the EEOC, of the 37,049 charges filed from June 30, 1969 to June 30, 1971, investigation was completed on only 12,411 of the charges. There was, therefore, a sizeable backlog of uninvestigated charges during this two year period.[8]

Resolution of the meaning of "charges pending" is of nationwide importance since approximately 100,000 charges were filed prior to the effective date of the 1972 Act. For example, it is undisputed that conciliation efforts had ceased by the end of May of 1971 on the 1968-69 sex discrimination charges here involved. When the EEOC thereupon issued to the charging parties notice of the failure of conciliation, the administrative procedure had come to an end. *Tuft* v. *McDonnell Douglas Corp.*, — F.2d —, 10 FEP Cases 929, 931 (8th Cir. May 27, 1975). By allowing the EEOC to resurrect such stale charges, the Sixth Circuit's decision makes the 1972 Act virtually retroactive to July 2, 1965, and is in conflict with Congressional intent and the decisions of the only district courts which have considered the issue.[9]

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[8] These figures have been obtained from the data in the "Appendix" of the Fifth and Sixth Annual Reports published by the EEOC in compliance with Section 705(e) of Title VII, as amended.

[9] EEOC v. Christiansburg Garment Co., *supra*, 376 F.Supp. 1067, in which the court rejected the EEOC's argument that any charge filed after July 2, 1965 and not dismissed by it or resolved by conciliation was a pending charge and held that Section 14 is not applicable to charges no longer in the process of negotiation and conciliation; EEOC v. Wilson & Co., 387 F.Supp. 1224 (D. Colo. 1975); White v. Texaco, Inc., 7 FEP Cases 367 (S.D. N.Y. Dec. 10, 1973); Guthrie v. Colonial Bakery Co., 6 FEP Cases 662 (N.D. Ga. Mar. 8, 1973); 118 CONG. REC. 718, 4816 (1972).

IV

In refusing to find or apply any time limit for the EEOC to bring suit under Section 706(f)(1) or to apply any applicable state statute of limitations, the Sixth Circuit stated that "so long as employment discrimination . . . persists, a time limit for suit seems unwarranted." 511 F.2d at 1358 n. 9. The Sixth Circuit's holding that a state statute of limitations does not run against the EEOC in a Title VII case is in irreconciliable conflict with the Fifth Circuit's later decision in *EEOC* v. *Griffin Wheel Co.*, 511 F. 2d 456 (5th Cir. 1975), in which the court found that to the extent a complaint seeks recovery for back pay, the suit is private in nature and must be filed within the period specified in the state statute of limitations.

Recently this Court stated that there is not anything "peculiar to a federal civil rights action that would justify special reluctance in applying state law." *Johnson* v. *Railway Express Agency*, 43 U.S.L.W. 4623, 4626, 4627 (U.S. May 19, 1975). As this Court further stated in that decision:

> Although any statute of limitations is necessarily arbitrary, the length of period allowed for instituting suit inevitably reflects a value judgment concerning the point at which the interests in favor of protecting valid claims are outweighed by the interests in prohibiting the prosecution of stale ones.
>
> 43 U.S.L.W. at 4626

The Sixth Circuit saw no reason for concern that the "EEOC may sue indefinitely based on a single charge, however stale and ancient" because "Congress has expressly limited employers' liability for back pay to two

years of a charge's filing."[10] 511 F.2d at 1358 n. 9. That statutory provision is of little protection to an employer sued in 1972 on a 1968 charge in which liability would extend back to 1966, as in the case at hand, or to another employer or union which might be sued at any future time based on a 1965 charge.

Although the Sixth Circuit's decision as to whether the EEOC must sue within 180 days after the filing of a charge is consistent with four other circuits, many well reasoned district court decisions have found otherwise after examining the statutory scheme and legislative history.[11] The issue is presented in petitions for certiorari in *EEOC* v. *Louisville & N. R.R., supra,* 43 U.S.L.W. 3572 (Apr. 15, 1974) (No. 74-1294), in *EEOC* v. *General Dynamics Corp.*, 43 U.S.L.W. 3603 (May 2, 1975) (No. 74-1378), and in *EEOC* v. *International Ass'n of Mach.*, 43 U.S.L.W. 3626 (May 16, 1975) (No. 74-1444).

The Sixth Circuit further ignored petitioner's claim that the 1971 Meek group charges were untimely filed. Yet under Title VII, charges had to be filed within 90 days after the act of discrimination. Title VII, § 706(d), 78 Stat. 260

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[10] The Sixth Circuit has misapplied the reasoning of the Court in Love v. Pullman Co., 404 U.S. 522 (1972), when stating that if the EEOC could seek the same relief by filing a fresh charge, requiring suit on a fresh rather than a stale charge is a mere procedural technicality, 511 F.2d at 1358. The scope of the suit and relief which could be sought differs radically, obviously prejudicing the defendant.

[11] EEOC v. Cleveland Mills Co., 502 F.2d 153 (4th Cir. 1974), *cert. denied,* 43 U.S.L.W. 3465 (Feb. 24, 1975); EEOC v. Louisville & N. R.R., *supra,* 505 F.2d 610 (5th Cir. 1974); EEOC v. duPont, *supra,* 10 FEP Cases 916 (3rd Cir. 1975); Tuft v. McDonnell Douglas Corp., *supra,* 10 FEP Cases 929 (8th Cir. 1975). For contrary district court decisions, see EEOC v. Wilson & Co., *supra,* 387 F.Supp. 1224 and the decisions listed by the Sixth Circuit at 511 F.2d 1355 n. 5.

(1964), *as amended*, 42 U.S.C. § 2000e-5(e) (1972). Here, the Meek group charges were not filed until almost five years after the events complained of occurred and thus could not in any event be a basis for an EEOC suit. *McDonnell Douglas Corp. v. Green, supra*, 411 U.S. at 798.

Under the Sixth Circuit's decision, the time period during which an employer or union is exposed to monetary liability and other sanctions is under the full and complete control of an agency which can sue without any established time limitation. The lack of limitations is contrary to a basic tenet of the common law—that there should be an end to litigation. It is a curious anomoly in view of the strict time limitations on suit by a charging party.

CONCLUSION

The cumulative effects of the holdings in the Sixth Circuit's decision and the far-reaching effects of that decision emphasize the impelling need for this Court to review the decision below. The need to avoid wasteful duplication of litigation and consequent burden on the federal courts, the need to have an end to litigation, and the need to have government agencies abide by their own regulations are all needs which cry out for the attention of this Court.

For the foregoing reasons, it is respectfully submitted that this petition for Writ of Certiorari should be granted.

J. FRASER HUMPHREYS, JR.

ALEXANDER W. WELLFORD, JR.
LAWLER, HUMPHREYS & DUNLAP
1500 First National Bank Building
Memphis, Tennessee 38103

J. LEONARD SAMANSKY
LIPKOWITZ & PLAUT
1290 Avenue of the Americas
New York, New York 10019

Attorneys for Petitioner,
Kimberly-Clark Corporation

Of Counsel:

THOMAS M. STANTON
EDWARD E. WALL
Kimberly-Clark Corporation
Neenah, Wisconsin 54956

APPENDIX

APPENDIX

No. 74-1558

United States Court of Appeals
For the Sixth Circuit

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
Plaintiff-Appellant,

v.

KIMBERLY-CLARK CORPORATION,
Defendant-Appellee.

APPEAL from the United States District Court for the Western District of Tennessee, Western Division.

Decided and Filed February 14, 1975.

Before, CELEBREZZE and MILLER, Circuit Judges, and O'SULLIVAN, Senior Circuit Judge.

CELEBREZZE, Circuit Judge. This case presents several procedural questions of importance to the Equal Employment Opportunity Commission (EEOC) and to parties bringing and defending charges before it. The basic issue is the scope of the EEOC's power to enforce the provisions of Title VII of the 1964 Civil Rights Act. The specific issues are whether the 1972 amendments to Title VII apply to this suit, whether the EEOC is barred from suing more than 180 days after a charge is filed with it, whether Tennessee's statute of limitations bars the suit, whether Ap-

pellant's suit may encompass particular race and sex discrimination charges, and whether the EEOC is limited to the right of permissive intervention once a private civil suit is brought.

This action began on February 2, 1973, when the EEOC sued in federal court to enjoin Appellee from engaging in employment discrimination based on sex and race. The complaint alleged that all conditions precedent to instituting the suit had been fulfilled and that Appellee had been and was then engaged in employment practices unlawful under section 703 (a) of Title VII of the 1964 Civil Rights Act, 42 U.S.C.A. § 2000e-2 (1974).

On April 4, 1973, Appellee filed a motion to dismiss or to obtain a more definite statement of Appellant's claims. On May 21, 1973, the District Court ordered Appellant to "set forth in their complaint specific charges alluded to and those steps or actions deemed to be prerequisite to the bringing of the complaint. . . ."

On June 18, 1973, Appellant filed an amended complaint, setting forth identical statements alleging illegal policies and practices but specifying the individual charges which had been filed with it against Appellee. A second amended complaint was filed on July 2, 1973.

Appellee then filed a document alternatively styled as a motion for summary judgment under Rule 56, Fed. R. Civ. P., a motion to strike allegations of the individual charges on various grounds, or a motion to compel compliance with the Court's prior Order. A hearing was held on September 7, 1973. Thereafter Appellant filed a motion to consolidate its suit with that of the sole private party to file a racial discrimination charge. This party, Mr. Floyd L. Munn, Jr., had filed his charge with the EEOC on June 6, 1969, and had brought suit on August 31, 1972, after receiving a right-to-sue letter from Appellant.

On March 27, 1974, the District Court entered its Order granting Appellee's motion for summary judgment and its motion to strike allegations of racial discrimination and of particular sex discrimination charges, and denying Appellant's motion for consolidation with the Munn private suit. 380 F.Supp. 1106 (W.D. Tenn. 1974).

The first issue we face is whether the 1972 amendments to Title VII apply to this case, a ground Appellee urges as sufficient to affirm the Order of the District Court, which did not address the question. A brief sketch of the background and purposes of the 1972 Act is helpful in answering this question.

Until 1972, the EEOC had no authority to enforce the provisions of Title VII, apart from its role of conciliating disputes between employee and employer. The 1972 amendments were intended to empower the EEOC to enforce Title VII.

The House Report on the 1972 amendments recommended that Congress "grant the Equal Employment Opportunity Commission authority to issue, through well established procedures, judicially enforceable cease and desist orders." H. R. Rep. No. 92-238, 92d Cong., 2d Sess. 1 (1972); 1972 U.S. Code Cong. & Ad. News. 1005. The legislative process, however, resulted in removal of cease-and-desist authority and substituted authorization for the Commission to sue directly in federal court. The substitution was not an attempt to dilute the provisions of Title VII or to deny the EEOC effective authority to enforce them. As the Minority Views on the House Report stated,

> "[T]he most significant issue that separates the majority of the committee from the minority is not whether the EEOC should be given enforcement authority. Rather, the issue is What procedures will

> insure the most effective enforcement of the substantive provisions of title VII . . ."
>
> 1972 U.S. Code Cong. & Ad. News 1036.

The House Minority Views' position that "enforcement of our laws can best be effectuated through our courts,"[1] ultimately prevailed.

In giving the EEOC authority "to prevent any person from engaging in any unlawful employment practice" under section 706(a) of Title VII, 42 U.S.C.A. § 2000e-5(a), Congress specified certain prerequisites to court action:

> "If within thirty days after a charge is filed with the Commission . . ., the Commission has been unable to secure from the respondent a conciliation agreement acceptable to the Commission, the Commission may bring a civil action against any respondent . . ."
> § 706 (f)(1), 42 U.S.C.A. § 2000e-5(f)(1).

Thus, the only pre-suit requirements were to be a 30-day wait after a charge's filing (except for temporary relief available under section 706(f)(2), 42 U.S.C.A. § 2000e-5(f)(2)) and the failure of conciliation efforts.

Fully aware of the substantial backlog of charges pending before the EEOC,[2] Congress explicitly stated in section 14 of the 1972 Act:

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[1] 1972 U.S. Code Cong. & Ad. News 1035.

[2] *See* S. Rep. No. 92-415, 92d Cong., 1st Sess. 5-6, 87 (1972); H.R. Rep. No. 92-238, 92d Cong., 1st Sess. 3-5, 12 (1972). *See also* 117 Cong. Rec. 14273 (1971) (remarks of Senator Kennedy); 117 Cong. Rec. 8517 (1971) (remarks of Representative Albert); 117 Cong. Rec. 8459 (1971) (remarks of Representative Martin); 118 Cong. Rec. 697 (1972) (remarks of Senator Dominick); 118 Cong. Rec. 699-70 (1972) (remarks of Senator Fannin); 118 Cong. Rec. 732 (1972) (remarks of Senator Brock); 118 Cong. Rec. 914 (1972) (remarks of Senator Talmadge); 118 Cong. Rec. 947 (1972) (remarks of Senator Allen); 118 Cong. Rec. 1056 (1972) (remarks of Senator Stevenson).

> "The amendments made by this Act to section 706 of the Civil Rights Act of 1964 shall be applicable with respect to charges pending with the Commission on the date of enactment of this Act and all charges filed thereafter."

Pub. L. No. 92-261, § 14, 86 Stat. 103 (Mar. 24, 1972). All charges pending with the EEOC on March 24, 1972 were thereby made available as a basis for an EEOC suit.

Appellee argues that all the charges which underlie the EEOC's complaint were not "charges" on March 24, 1972, because the charges had passed from the stage of "charges" to the status of "cases" under EEOC Regulations, 35 Fed. Reg. 10110 (1970).[3]

Appellee's argument is an exercise in linguistic sophistry. There is no indication in the legislative history that Congress was making the "charge-case" distinction in applying the 1972 amendments to pending "charges." Indeed, the evidence is that Congress intended to give as much protection as possible to aggrieved parties and broad authority to a Commission swamped with a backlog of work.[4] *See*

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[3] Under EEOC procedures, a "charge" becomes a "case" after an initial investigation is completed and a case number is assigned. This distinction between a "case" and a "charge" is purely for internal administrative purposes and is clearly not controlling when considering what Congress meant by "charges" in enacting the 1972 amendments.

[4] *See* S. Comm. on Labor and Public Welfare, Legislative History of the Equal Employment Opportunity Act of 1972, 92d Cong., 2d Sess. 1674 (1972). The letter from the Department of Justice which is cited therein as the basis for section 14 stated, "we see no reason why the many thousands of persons who have filed charges which are still being processed and who have waited as long as 18 months to two years for resolution of them should not have the benefit of the new enforcement authority." The letter is quoted in *EEOC* v. *Christiansburg Garment Co., Inc.*, 376 F.Supp. 1067, 1074 (W.D. Va. 1974). This letter fully rebuts Appellee's argument.

EEOC v. *Eagle Iron Works*, 367 F. Supp. 817, 820 (S.D. Iowa 1973); *EEOC* v. *Bartenders Local 41*, 369 F. Supp. 827, 830 (N.D. Cal. 1973). *Cf. EEOC* v. *Christiansburg Garment Co., Inc.*, 376 F.Supp. 1067, 1073-74 (W.D. Va. 1974).

The second issue is whether section 706(f)(1) of Title VII precludes the EEOC from filing suit more than 180 days after a charge is filed with it. The District Court held that the EEOC is so precluded and granted summary judgment for Appellee on the ground that all the underlying charges had been filed with the Commission more than 180 days before the EEOC brought suit. The District Court concluded thusly "with some trepidation in view of the split of authority" among the district courts which had considered the question.[5]

Section 706(f)(1), 42 U.S.C.A. § 2000e-5(f)(1), does not on its face limit the EEOC's power to seek court enforce-

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[5] As of this writing, the following decisions have held that the 180-day provision limits the time within which the EEOC may sue: *EEOC* v. *United States Pipe & Foundry Co.*, 375 F.Supp. 237 (N.D. Ala. 1974); *EEOC* v. *Union Oil Co. of California*, 369 F.Supp. 579 (N.D. Ala. 1974); *EEOC* v. *Container Corp. of America*, 352 F. Supp. 262 (N.D. Fla. 1972); *EEOC* v. *General Dynamics Corp.*, 8 FEP Cases 588 (N.D. Tex. Aug. 15, 1973).

Decisions which have held to the contrary include *EEOC* v. *Louisville & N. R.R.*, No. 74-1185 (5th Cir. Dec. 16, 1974), *rev'ng* 368 F.Supp. 633 (N.D. Ala. 1974); *EEOC* v. *Cleveland Mills Co.*, 502 F.2d 153 (4th Cir. 1974), *rev'g* 364 F.Supp. 1235 (W.D. N.C. 1973); *EEOC* v. *U. S. Industries*, Civil No. 73-283 (W.D. Tenn. Jan. 3, 1974); *EEOC* v. *Christiansburg Garment Co.*, 376 F.Supp. 1067 (W.D. Va. 1974); *EEOC* v. *E. I. duPont de Nemours & Co.*, 373 F.Supp. 1321 (D. Del. 1974); *EEOC* v. *Hickey-Mitchell Co.*, 372 F.Supp. 1117 (E.D. Mo. 1973); *EEOC* v. *Huttig Sash & Door Co.*, 371 F.Supp. 848 (S.D. Ala. 1974) appeal docketed, No. 74-1493 (5th Cir. Feb. 21, 1974); *EEOC* v. *Bartenders Local 41*, 369 F.Supp. 827 (N.D.Cal. 1973); *EEOC* v. *Eagle Iron Works*, 367 F.Supp. 817 (S.D. Iowa 1973); *EEOC* v. *Duff Brothers*, 364 F.Supp. 405 (E.D. Tenn. 1973); *EEOC* v. *Mobil Oil Corp.*, 362 F.Supp. 786 (W.D. Mo. 1973); *EEOC* v. *Western Electric Co.*, 8 FEP Cases 595 (D. Md. Aug. 15, 1974).

ment of Title VII to 180 days from the filing of an administrative charge. In relevant part the section reads,

> If within thirty days after a charge is filed with the Commission * * *, the Commission has been unable to secure from the respondent a concilation agreement acceptable to the Commission, the Commission may bring a civil action against any respondent not a government, governmental agency, or political subdivision named in the charge. * * * The person or persons aggrieved shall have the right to intervene in a civil action brought by the Commission * * *. If a charge filed with the Commission pursuant to subsection (b) of this section is dismissed by the Commission, or if within one hundred and eighty days from the filing of such charge * * * the Commission has not filed a civil action under this section * * * or the Commission has not entered into a conciliation agreement to which the person aggrieved is a party, the Commission * * * shall so notify the person aggrieved and within ninety days after the giving of such notice a civil action may be brought against the respondent named in the charge (A) by the person claimed to be aggrieved or (B) if such charge was filed by a member of the Commission, by any person whom the charge alleges was aggrieved by the alleged unlawful employment practice. * * * Upon timely application, the court may, in its discretion, permit the Commission * * * to intervene in such civil action upon certification that the case is of general public importance. * * *

The District Court construed section 706(f)(1) as cutting off the EEOC's right to sue 180 days after the filing of an administrative charge and thereafter limiting the Commission to permissive intervention in a private suit. The arguments the District Court gave for its construction were that

Congress intended speedy disposition of charges, that "a time restriction (180 days) is a part of a statutory scheme of controlled time frames," and that the 180-day restriction would not hinder Title VII's enforcement "since new charges may be filed or an aggrieved individual may sue in his own right and on a class action basis."

We reject the District Court's conclusion and join the two other Circuit Courts to have decided this issue. *EEOC* v. *Cleveland Mills Co.*, 502 F.2d 153 (4th Cir. 1974); and *EEOC* v. *Louisville & N. R.R.*, No. 74-1185 (5th Cir. Dec. 16, 1974).

The statute does not expressly limit the period within which the EEOC may sue to 180 days from the filing of a charge. In one sentence of section 706(f)(1) the EEOC is authorized to sue to enforce Title VII if after thirty days from a charge's filing a conciliation agreement has not been reached. In a later sentence the EEOC is required to notify a charging party when an agreement has not been reached 180 days after the charge's filing, and the private party is then authorized to sue. Authorization for a private suit does not expressly deprive the EEOC of power to sue.

It is by judicial amendment that the 180-day provision has been read to cut off the EEOC's enforcement powers. If Congress had intended to cut off the Commission's right to sue after 180 days from a charge's administrative filing, it should and would have done so expressly. *Cf. McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792, 798-99 (1973).

Indeed, Congress expressly limited the time within which a private party may sue. The private party has only ninety days to bring suit after the Commission's dismissal of the administrative charge, after 180 days from the filing of the charge, or after "the expiration of any period of reference

under subsection (c) or (d)" of section 706. The Commission is not bound by such an express time limitation.

A statute, of course, should always be read in conjunction with its evident purposes. When we look behind the silent face of the statute, we find clear congressional intent not to restrict the EEOC's enforcement powers to within 180 days of a charge's filing.

Through its 1972 amendments to Title VII, Congress intended to strengthen the EEOC's role of conciliator and to give it the task of enforcer. The House Report on the amendments stated that the "voluntary approach currently applied has failed to eliminate employment discrimination," 1972 U.S. Code Cong. & Ad. News 1007, and the Minority Views on the House Report concur in this observation, 1972 U.S. Code Cong. & Ad. News 1035.[6] Furthermore, Congress "hoped that recourse to the private lawsuit will be the exception and not the rule and that the vast majority of complaints will be handled through the offices of the EEOC or the Attorney General, as appropriate." Joint Conference Committee, Section-by-section Analysis, 118 Cong. Rec. 3462 (Mar. 6, 1972).

The EEOC's added enforcement authority was not, however, intended to supplant the heavy reliance on conciliation as a preferred method for eradicating employment discrimination. As the March 8, 1972 Conference Report stated, "Only if conciliation proves to be impossible do we expect the Commission to bring an action in federal district court to seek enforcement." 118 Cong. Rec. 1861 (1972).

We cannot reconcile Congress' dual directive that the EEOC attempt to conciliate employment discrimination

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[6] *See also* 118 Cong. Rec. 696 (1972) (remarks of Senator Dominick, introducing amendments which eventually became the basis for the EEOC's enforcement powers).

claims and that it carry a heavy judicial enforcement burden with a 180-day limitation on the Commission's right to sue. Such a limitation would restrict conciliation efforts to within a period of fewer than 180 days after the filing of a charge. It is precisely in the type of case where the EEOC might ultimately decide to sue—where widespread discrimination of a systematic or subtle nature is involved —that effective conciliation attempts may well require more than six months. In such cases, discussion will be necessary with labor unions and company personnel, expert consultants may be involved, and the charging parties must be kept fully informed of the progress of negotiations. Forcing the EEOC to break off conciliation efforts 180 days after the filing of a charge for fear of losing the right to sue would frustrate the congressional mandate that conciliation efforts be fully undertaken before resort to the courts.

Construing the 180-day provision as a statute of limitations is also flatly in conflict with section 14 of the 1972 Act, which made the amendments effective as to charges then "pending" with the Commission. It is clear that many of the pending charges on the basis of which Congress intended to allow the EEOC to sue had been pending from 18 to 24 months.[7] Application of the 180-day provision as Appellee urges would bar usage of these charges as a basis for suit—private or public—despite explicit congressional intent that two-year-old charges "have the benefit of the new enforcement authority."[8]

The fallacy of Appellee's position becomes clear when the following fact is recognized: if the 180-day provision limits the EEOC's time to bring suit on an individual charge, the EEOC could raise the same issues and seek the same relief it does here simply by having a fresh charge

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[7] *See* text *supra* at n. 4.

[8] *See* text *supra* at n. 4.

filed with it. When a court is urged to read a procedural technicality into a statute which will have no impact on the rights of any party and which can easily be complied with, the court should hesitate to infer such a requirement from the statute. The Supreme Court has rejected arguments similar to Appellee's in regard to the inter-relationship of state and federal agency consideration of a charge, *Love* v. *Pullman Co.*, 404 U.S. 522 (1972), and the need for a Commission's finding of reasonable cause as a prerequisite to private suit, *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792, 798-99 (1973). As the Court stated in *Love*, "To require a second 'filing' by the aggrieved party after termination of state proceedings would serve no purpose other than the creation of an additional procedural technicality." 404 U.S. at 526. Requiring refilings or new filings in this case would similarly serve no valid purpose. In giving Title VII the same construction as the Supreme Court gave it in *McDonnell Douglas Corp.*, we are struck by the pertinence of this statement:

> The Act does not restrict a complainant's right to sue to those charges as to which the Commission has made findings of reasonable cause, and we will not engraft on the statute a requirement which may inhibit the review of claims of employment discrimination in the federal courts.
>
> 411 U.S. at 798-99.

We find in the 1972 amendments no express 180-day limitation on the EEOC's right to sue, and we will not imply a requirement that would merely delay or frustrate the Commission's authority to seek judicial enforcement of Title VII.[9]

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[9] An understandable concern of employers is that without the 180-day limit, the EEOC may sue indefinitely based on a single charge, however stale and ancient.

The 180-day provision, of course, has its purpose. It expressly prevents a private party from bringing suit until the EEOC has had 180 days to negotiate a conciliation agreement, unless other events occur sooner as specified in section 706(f)(1), 42 U.S.C. § 2000e-5(f)(1). Before 1972, a private party satisfied the jurisdictional prerequisites to suit "(i) by filing timely charges of employment discrimination with the Commission and (ii) by receiving and acting upon the Commission's statutory notice of the right to sue." *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792, 798 (1973). Because conciliation efforts had often taken two or three years to institute, thereby delaying issuance of the right-to-sue notice, the 180-day provision was inserted to provide

> the aggrieved party a means by which he may be able to escape from the administrative quagmire which occasionally surrounds a case caught in an overloaded administrative process.
>
> • • •
>
> The bill provides that an aggrieved person's right to institute a private action should be reactivated under

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It is not unusual for a provision authorizing the federal government to enforce constitutional rights to have no statute of limitations attached. The public accommodations and public facilities sections of the 1964 Civil Rights Act, 42 U.S.C.A. §§ 2000a *et seq.*, and 2000b, *et seq.*, contain no time limit for suit. *See also United States* v. *Summerlin*, 310 U.S. 414 (1960); *United States* v. *DeQueen & Eastern R.R.*, 271 F.2d 597 (8th Cir. 1959).

Use of a truly "stale" charge will mean that injunctive relief is probably unwarranted under traditional equitable principles. Furthermore, Congress has expressly limited employers' liability for back pay to two years of a charge's filing. 42 U.S.C.A. § 2000e-5(g). Thus, we see no cause for concern over the absence of a statute of limitations. Indeed, so long as employment discrimination and the effects of past employment discrimination persist, a time limit for suit seems unwarranted. In any event, this is a decision for Congress, which in our view has decided not to impose a time limit on EEOC suits.

certain circumstances where the Commission does not act promptly after issuing a complaint. Section 715 (a) provides that an aggrieved person may bring an independent action against the respondent if the Commission has not issued its order within 180 days. The committee believes that aggrieved persons are entitled to have their cases processed promptly and that the Commission should develop its capacity to proceed rapidly to hearing and decision once the complaint is issued. The committee recognizes that it will not be possible to render a decision in all cases within the time limit prescribed. The complexity of many of the charges and the time required to develop the cases, is well recognized by the committee. It is assumed that individual complainants, who are apprised of the need for the proper preparation of a complex complaint involving multiple issues and extensive discovery procedures, would not cut short the administrative process merely to encounter the same kind of delays in a court proceeding. It would, however, be appropriate for the individual to institute a court action where the delay is occasioned by administrative inefficiencies. The primary concern must be protection of the aggrieved person's option to seek a prompt remedy in the best manner available.[10]

The 180-day provision survived in the Act's final form, though the House Report's proposal to give the EEOC authority to issue cease-and-desist orders did not. The 180-day provision's purpose is served under the present law by protecting the private party from undue administrative delay during the conciliation stage, guaranteeing the right of private suit six months after a charge is filed.

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[10] H.R. Rep. No. 92-238, 92d Cong., 1st Sess. (1972), 1972 U.S. Code Cong. & Ad. News 1015-16.

In summary, we find that the 180-day provision was not intended to hamper the EEOC's ability to enforce Title VII but rather was meant to guarantee private parties prompt recourse to the courts after a reasonable period of conciliation efforts. The EEOC is not barred from basing a complaint on a charge filed more than 180 days prior to the EEOC's suit. The District Court's contrary conclusion is erroneous, and its Order must be reversed in this respect.

Appellee urges affirmance of the dismissal of Appellants' complaint, nonetheless, on the ground that Tennessee's one-year statute of limitations bars the EEOC's complaint.

We agree with the District Court that a state statute of limitations does not run against the EEOC in this case. The EEOC alleges company practices that violate Title VII. If its complaint is well-founded, it will be entitled to relief that will protect the interests of past, present, and future employees of Appellee, so that Appellant represents the interests of individuals who are not among the charging parties. Furthermore, the eradication of discrimination by race and sex promotes public interests and transcends private interests. Each step along the road to equal employment opportunity takes us closer to the goal of a truly open society, confining individuals only within boundaries set by their own talents and determination. As we wrote in *Blue Bell Boots, Inc.* v. *EEOC*, 418 F.2d 355, 358 (6th Cir. 1969), "Title VII of the Civil Rights Act of 1964 should not be construed narrowly, and the Commission may, in the public interest, provide relief which goes beyond the limited interests of the charging parties." Thus, the EEOC represents the public interest when it sues to enforce Title VII, not solely the interests of the private charging parties. In the absence of congressional intent to apply state statutes of limitations, such restrictions do not apply

to the EEOC.[11] *United States* v. *Summerlin*, 310 U.S. 414, 416 (1940); *EEOC* v. *Christiansburg Garment Co., Inc.*, 376 F.Supp. 1067, 1071-73 (W.D. Va. 1974); *EEOC* v. *Laacke & Joys Co.*, 375 F.Supp. 852, 853 (E.D. Wisc. 1974); *EEOC* v. *Eagle Iron Works*, 367 F.Supp. 817, 823-24 (S.D. Iowa 1973); *EEOC* v. *Duff Brothers, Inc.*, 364 F.Supp. 405, 406-07 (E.D. Tenn. 1973).

The District Court held that two sets of charges (the "Dunavan" and "Williams group" charges) were available as a basis for the EEOC's suit but for its conclusion on the 180-day provision. Since we reject the District Court's construction of that provision and find no alternative basis for affirming the dismissal of Appellant's complaint, we must reverse the District Court's Order and reinstate the EEOC's complaint.

The District Court did not rest its conclusion solely on the 180-day provision. Instead, it addressed the availability of the particular charges on which Appellant grounded its complaint and held that the "Meek group" and "Munn" charges were barred from full consideration. Since the treatment of particular charges has an important bearing on the scope of the issues the EEOC may raise on remand, we will address the treatment of each charge.

Appellee urges that the "Dunavan" and "Williams group" charges are not available as a basis for suit by the EEOC.

The "Dunavan" charge is a sex discrimination claim filed with the EEOC on February 17, 1971, and amended on April 26, 1971. A determination of reasonable cause to believe the charges are true was made on August 17, 1971. Appellee argues that there was no conciliation of this

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[11] *See* Note; "A Limitation on Actions for Deprivation of Federal Rights," 68 Colum. L.Rev. 763, 771 (1968).

charge as required by Title VII. A review of the record, however, establishes that conciliation was attempted. The Dunavan charge is available as a basis for the EEOC suit.

Appellee argues that the "Williams group" of sex discrimination charges is not available because Appellant did not notify it that conciliation had failed and was terminated before bringing suit, as required under EEOC Regulations, 29 C.F.R. §§ 1601.23, 1601.25.

The EEOC should, of course, follow its own procedures as it conciliates charges, in the hopes of avoiding suit. Notice that conciliation has failed gives an employer "one last chance to alter its position with regard to the issues being discussed during conciliation with the knowledge that the statutory scheme provides for litigation as the next step." *EEOC* v. *Louisville & N. R.R.* 368 F.Supp. 633, 638 (N.D. Ala. 1974), *rev'd*, No. 74-1185 (5th Cir. Dec. 16, 1974).

The lack of notice that conciliation had failed on the "Williams group" charges, however, did not prejudice appellee. The record shows that Appellee was given a proposed conciliation agreement on these charges but rejected it. Thereafter, conciliation continued on the Dunavan and "Meek group" charges, but was similarly unproductive. On December 4, 1972, notice was sent that conciliation had failed on the Dunavan and "Meek group" charges. Thus, Appellee was apprised of the imminence of suit concerning sex discrimination charges prior to Appellant's suit. It suffered no significant prejudice by not being notified of the failure of conciliation on the "Williams group" of charges as well, since these charges concerned substantially identical issues of company practices.

When an agency neglects to follow a procedural rule but its failure inflicts no significant injury on the party entitled

to observance of the rule, the error does not prevent further administrative or judicial action. Instead, the error should be considered harmless. *American Farm Lines* v. *Black Ball Freight Service*, 397 U.S. 532, 537-39 (1970); *Sun Oil Co.* v. *Federal Power Commission*, 256 F.2d 233, 239 (5th Cir. 1958); *NLRB* v. *Selwyn Shoe Mfg. Corp.*, 428 F.2d 217, 224 (8th Cir. 1970). This is the rule especially when the agency is not itself adjudicating but is conducting pre-adjudication activities. *Hannah* v. *Larche*, 363 U.S. 420, 422 (1960). *Cf. Cunningham* v. *Litton Industries*, 413 F.2d 887, 890 (9th Cir. 1969). The "Williams group" of charges, therefore, was available as a basis for the EEOC's suit.

The District Court ruled that the "Meek group" of charges was not a proper independent basis for the EEOC suit. This group of charges, filed in 1971, alleges discriminatory lay-offs of female employees in 1965 and 1966 and Appellee's refusal to restore credit for the period of the lay-offs as agreed in a 1967 settlement of a class action suit.

The District Court held that the 1967 court-approved private settlement prevented the EEOC from "assert[ing] a later cause of action either to undo or to obtain greater relief than was accorded to those plaintiffs under the [settlement] order," and it granted summary judgment in part. The Court held, however,

> Plaintiff here may pursue its action with regard to sex discrimination charges after 1967 without regard to a bar of res adjudicata. The evidence as to circumstances of the 1965 lay-off may be relevant, moreover, to a claimed pattern of sex employment discrimination.

Appellant argues that the District Court's decision represents a "fundamental misconception" of the relationship between a private suit and EEOC action and urges correction of the District Court's holding that the EEOC was a

"privy" to the plaintiffs who signed the 1967 settlement agreement.

We agree with Appellant that it was not "privy" to the 1967 settlement and that it is not barred by principles of collateral estoppel or res judicata from relying on pre-1967 events alleged by the "Meek group" of charges as a basis for its complaint. The EEOC never agreed to the 1967 settlement. As we stated above, the EEOC sues to vindicate the public interest, which is broader than the interests of the charging parties. The 1967 settlement and the November 10, 1972 signing of waivers and releases by the Meek group may well limit the scope of relief that the EEOC may seek for the "Meek group's" private benefit. *Cf. United States* v. *Georgia Power Co.*, 474 F.2d 906 (5th Cir. 1973). But the EEOC is not barred by the doctrine of res judicata from basing its complaint on charges of discrimination which it never agreed to settle.[12] *Williamson* v. *Bethlehem Steel Corp.*, 468 F.2d 1201, 1203-04 (2d Cir. 1972); *EEOC* v. *Eagle Iron Works*, 367 F.Supp. 817, 822 (S.D. Iowa 1973).

Our holding on this point may be limited significance in this case, since the "Dunavan" and "Williams group" of charges form an adequate basis for an EEOC suit alleging sex discrimination by Appellee. As we held in *Tipler v. E. I. DuPont de Nemours and Co.*, 443 F.2d 125, 131 (6th Cir. 1971), the EEOC may raise issues based on a charge

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[12] A contrary holding would conflict with Congressional intent. *See, e.g.*, remarks of Senator Dominick, introducing amendments which eventually became the basis for section 706(f)(1), that the EEOC, not private parties, "would have complete authority to decide which cases to bring to Federal district court." 118 Cong. Rec. 698 (Jan. 21, 1972).

We note, furthermore, that EEOC Regulations prevent withdrawal of a charge without the EEOC's consent. 29 C.F.R. § 1601.9. Appellant's consent was not obtained for the withdrawal of the "Meek group's" charges or the settlement of their claims.

limited only by "the scope of the EEOC investigation reasonably expected to grow out of the charge of discrimination." A full investigation of Appellee's employment practices in regard to sex discrimination is warranted on the basis of the "Dunavan" and "Williams group" charges. Our holding as to the "Meek group" is intended simply to insure that a full review will in fact be made and to provide guidance for the courts of the Circuit.[13]

The "Munn" charge is the only one filed with the EEOC that alleges racial discrimination by Appellee. Mr. Floyd A. Munn, Jr., filed his charge with the Commission on June 6, 1969, and amended it on April 20, 1970. On May 12, 1972, the EEOC issued a finding of reasonable cause to believe the charges were true, and on July 24, 1972, it issued Munn a right-to-sue notice. On August 31, 1972, Munn filed a private class action. On February 2, 1973, the EEOC filed its complaint, alleging sex and racial discrimination by Appellee, and on March 4, 1974, it moved to consolidate Munn's private suit with its own.

The District Court held that the prior filing of Munn's complaint restricted Appellant to the right of permissive intervention in the private suit, under section 706(f)(1) of Title VII, 42 U.S.C.A. § 2000e-5(f)(1) quoted *supra* at pp. 6-7. Thus, the District Court granted Appellee's motion to strike all allegations of racial discrimination from Appellant's complaint, without prejudice to a later suit on an appropriate racial discrimination charge or to Appellant's

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[13] We need not decide whether the EEOC's failure to issue a determination of reasonable cause concerning the "Meek group's" charges bars EEOC reliance thereon. We note, however, that section 706(f)(1) appears to set forth the sole prerequisites to EEOC reliance on a charge as a basis for suit, that the Supreme Court rejected a closely related contention in *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792, 798-99 (1973), and that our discussion of the "Williams group" charges is relevant to this issue.

right to seek intervention in the Munn suit. The District Court further denied Appellant's motion to consolidate.

Although section 706(f)(1) does not explicitly limit the EEOC to permissive intervention once a private suit is brought, the section does specify a particular route by which the EEOC may enforce Title VII in that circumstance:

> Upon timely application, the court may, in its discretion, permit the Commission . . . to intervene in [a private] civil action upon certification that the case is of general public importance.

The specification of a particular method of review is said to preclude the use of unspecified methods, under the maxim *expressio unius est exclusio alterius* ("the expression of one thing implies the exclusion of another thing."[14]) *See National R.R. Passenger Corp.* v. *National Ass'n of R.R. Passengers*, 414 U.S. 453, 458 (1974); *Botany Worsted Mills* v. *United States*, 278 U.S. 282, 288-89 (1929); *Walla Walla* v. *Walla Walla Water Co.*, 172 U.S. 1, 22 (1898); *Sturges* v. *Collector*, 79 U.S. (12 Wall.) 19, 27 (1870). This phrase is of course, a rule of thumb to interpreting legislative intent rather than a principle of law.

The Congressional purpose behind the sentence authorizing permissive intervention in private suits is evident from the House Report, which recommended cease-and-desist authority for the EEOC:

> The committee was concerned about the interrelationship between the newly created cease and desist enforcement powers of the Commission and the existing right of public action. It concluded that duplication of

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[14] J. Ballentine, Ballentine's Law Dictionary 442 (3d ed. 1969).

> proceedings should be avoided. The bill, therefore, contains a provision for termination of Commission jurisdiction once a private action has been filed (except for the power of the Commission to intervene in the private actions). It contains as well a provision for termination of the right of private action once the Commission issues a complaint or enters into a conciliation or settlement agreement which is satisfactory to the Commission and to the person aggrieved.
> H. R. Rep. No. 92-238, 92d Cong., 2d Sess., 1972 U.S. Code Cong. & Admin. News at 2148.

Although cease-and-desist authority for the EEOC was eventually rejected, the House and Senate Conference produced section 706(f)(1), adopting the same reasoning as contained in the quoted excerpt of the House Report:

> The conferees adopted a provision allowing the Commission, or the Attorney General in a case against a state or local government agency, to bring an action in Federal district courts if the Commission is unable to secure from the respondent "a conciliation agreement acceptable to the Commission." Aggrieved parties are permitted to intervene. They may bring a private action if the Commission or Attorney General has not brought suit within 180 days or the Commission has entered into a conciliation agreement to which such aggrieved party is not a signatory. The Commission, or the Attorney General in a case involving state and local governments, may intervene in such private action.
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> Joint Explanatory Statement of Managers at the Conference on H.R. 1746, 92d Cong. 2d. Sess., 1972 U.S. Code Cong. & Ad. News at 1050.

From these Reports it is evident that Congress meant to prevent duplicitous proceedings by limiting the EEOC to

the right of permissive intervention in a private action, when the EEOC's action parallels that of the private party, raising no substantially different issues and seeking no relief other than for the private party.

The Congressional intent that duplicitous proceedings be avoided does not mean, however, that the EEOC should be limited to permissive intervention in a private suit when its investigation on the one charge has disclosed a number of violations which require judicial attention. As we held in *Tipler* v. *E. I. duPont deNemours & Co.*, 447 F.2d 125, 131 (6th Cir. 1971):

> [T]he [EEOC's] complaint . . . is only limited to the scope of the EEOC investigation reasonably expected to grow out of the charge of discrimination.

If it appears that the EEOC investigation of the Munn charge could reasonably have been expected to disclose that company practices had a racial impact extending beyond Munn's particular situation, the EEOC was entitled to bring its own suit based on its investigation's revelations.

The EEOC's suit encompasses allegations that extend beyond Munn's private complaint, both in the scope of concern and in the extent of relief sought. Thus, it would not be duplicitous to allow both Appellant's and Munn's suits to proceed, though consolidation might be thought appropriate. Indeed, allowing the EEOC to assert its own cause of action alleging racial discrimination furthers the basic purpose of the 1972 amendments to Title VII—to give the EEOC authority to prevent violations of Title VII.[15]

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[15] We respectfully disagree with the Eight Circuit's conclusion in *EEOC* v. *Missouri Pacific R.R.*, 493 F.2d 71 (8th Cir. 1974). As Judge Heaney points out in his concurrence in that case, 493 F.2d at 75, a grant of permissive intervention does not guarantee that the EEOC will be able to raise issues that have arisen in the investigation of a claim on which the private party has sued, when the issues

The District Court erred, therefore, in striking allegations of racial discrimination from Appellant's complaint and in denying its motion to consolidate on this basis. On remand, the District Court should reconsider Appellant's consolidation motion under Rule 42(a), F.R.Civ.P. *See Oatis* v. *Crown Zellerbach Corp.*, 398 F.2d 496 (5th Cir. 1968); *De Figueiredo* v. *TWA, Inc.*, 322 F.Supp. 1384 (S.D. N.Y. 1971); *Hall* v. *Werthan Bag Corp.*, 251 F.Supp. 184 (M.D. Tenn. 1966).

The judgment of the District Court is reversed, and the cause is remanded for further proceedings in conformity with this opinion, to be held promptly in accordance with 42 U.S.C. § 2000e-5(f)(5).

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the EEOC seeks to litigate are not raised by the private party. We believe the remedy for this is not to expand the concept of intervention beyond its normal meaning, but to allow the EEOC to bring suit based on the findings that its investigation warrants.

In the United States District Court for the
Western District of Tennessee
Western Division

Equal Employment Opportunity Commission,
Plaintiff,
v.
Kimberly-Clark Corporation,
Defendant.
No. C-73-42

ORDER ON MOTION TO CONSOLIDATE AND ON MOTION FOR SUMMARY JUDGMENT AND TO STRIKE

This suit was filed by the Equal Employment Opportunity Commission (E.E.O.C.) on February 2, 1973, raising various broad allegations of sex discrimination as well as several additional allegations of racial discrimination. The sole defendant named was Kimberly-Clark Corporation, and the alleged violations involved the Memphis mill or plant. In response to the Court's orders granting defendant's Motion for a More Definite Statement, the E.E.O.C. filed an amended complaint on June 15, 1973, and a second amended complaint on June 28, 1973, in which the E.E.O.C. set forth the details of the charges upon which suit was based. Of these charges, only one, that of Floyd L. Munn, Jr., contained allegations of racial discrimination, and the remaining charges contained allegations of sex discrimination. On the grounds that none of the charges formed a

proper basis for suit by the E.E.O.C. and that the E.E.O.C. had not properly complied with the Court's orders, the defendant filed on July 16, 1973, a Motion for Summary Judgment or Motion to Strike or Motion to Compel Compliance with the Court's orders.

As part of the Motion for Summary Judgment, the defendant contended that any allegations of racial discrimination based upon the charge filed by Floyd L. Munn, Jr. were improper and should be dismissed, since suit had already been filed in the *Munn* case based upon the same charge. In a supplemental memorandum filed by the defendant, it was argued that consolidation was improper and that the E.E.O.C. should have sought to intervene in the pending class action as provided in the Equal Employment Opportunity Act of 1972 (the "1972 Act").

Insofar as the E.E.O.C.'s only racial discrimination claims in this case were based upon the Munn charge, it duplicates charges made by experienced and competent counsel for Munn who filed suit alleging violations of Title VII against Kimberly-Clark and several locals of the United Paperworkers International Union in this Court on August 31, 1972 (No. C-72-300). E.E.O.C. now seeks consolidation of this case with the *Munn* (and his co-plaintiff Charlie R. Jones, Jr.) case. Both Kimberly-Clark and the unions oppose the consolidation asserting that the E.E.O.C. should be bound to follow Section 706(f)(1) Title VII requirements of intervention.

This Court has sustained similar arguments in E.E.O.C. cases previously. E.E.O.C. v. McLean Trucking, et al, 7 EPD § 9178, (No. C-72-313, 1974) and E.E.O.C. v. ET & WNC Transportation, et al, (No. C-72-280, 1974). See E.E.O.C. v. Missouri Pacific Railroad, 493 F.2d 71 (8th Cir. 1974); Crump v. Wagner Elec. Corp., 369 F.Supp. 637

(E.D.Mo. 1973); E.E.O.C. v. Cronin, (E.D.Mo. 1973); E.E.O.C. v. Union Oil Co. of Calif., 369 F.Supp. 579 (N.D. Ala. 1974). As stated in the *Missouri Pacific* case, *supra*:

> "The scheme of the statute itself, as thus described, negates the Commission's double-barreled approach. Once either the Commission or the charging party has filed suit, Section 2000e(f)(1)[1] speaks only in terms of intervention—the absolute right of the charging party to intervene if the Commission elects to file suit within 180 days; the permissive right of intervention on the part of the Commission in the private action. The statute cannot be read to warrant duplicitous lawsuits when both actions find their genesis in *one* unlawful employment practice." (emphasis ours)

A charge based on sex discrimination is not per se a basis for a suit asserting both sex and racial discrimination. E.E.O.C. v. New York Times, d/b/a WREC-TV, (W.D. Tenn. 1974); Fix v. Swinerton, 320 F.Supp. 58 (D.C.Colo. 1970). Compare Sanchez v. Standard Brands, 431 F.2d 455 (5th Cir. 1970). Under the circumstances here, particularly since the *Munn* case pending will be concerned solely with racial discrimination matters, the discrimination by reason of race or color allegations and prayers for relief based solely on the Munn charge should be dismissed. Defendant's motion to strike in this respect will be granted without prejudice to the E.E.O.C.'s permissive right of intervention in No. C-72-300, or even to bring a subsequent action on any other appropriate racial discrimination charges.

The bulk of the sex discrimination charges upon which E.E.O.C. bases its cause of action are what have been referred to by the parties as the "Meek group of charges."

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[1] Same as Sec. 706(f)(1) of the Civil Rights Act of 1964, Title VII, as amended.

These charges involve alleged discrimination by defendant in respect to lay-offs of certain female employees in 1965 and in 1966, and as to which suit was filed in this Court in 1966, Cooper, et al. v. Kimberly-Clark Corp., et al., No. C-66-251. All ten of the "Meek group" females through their retained counsel filed charges with the E.E.O.C. prior to suit in that case, asserting a class action complaint against the employer and Local 704 of the Paper Mill Workers.[2] After a full opportunity for hearing on the merits and the adequacy and propriety of settlement, the Court entered on December 8, 1967 an order in accordance with a stipulation and settlement, which set out, in pertinent part:

> "The complaint in this action . . . is dismissed on the merits, . . . and judgment . . . is in full and final discharge and satisfaction of any and all claims, or causes of action, or part or parts thereof, against any and all defendants herein and with respect to any and all claims and demands growing out of or arising from or based upon any transaction, matter or cause, either involved in, alleged or referred to . . . directly or indirectly, in this action and the complaint filed herein."

The "Meek group" in 1971 filed charges again with the E.E.O.C. pertaining to the 1965 lay-offs, but adding that "the company refuses to restore our seniority rights," particularly by "refusing to give us credit, for seniority and other purposes, for a period of time we were unlawfully in lay-off status during 1965 and 1966." The company now asserts that the ten females comprising this "Meek group" are estopped from further proceedings by reason of the 1967 court approved settlement, and that principles of equitable estoppel, collateral estoppel and/or res adjudicata should now prevent the E.E.O.C. from proceed-

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[2] One of the defendants in the *Munn* case. No. C-72-300.

ing with a new cause of action herein based on these same charges.

> "A consent judgment or decree based on compromise and settlement precludes the parties *and their privies* from maintaining an action upon any claim *within the scope* of such compromise and settlement, although such claim was not in fact litigated in the suit in which the judgment or decree was entered."[3] (emphasis ours).

See All States Investors v. Sedley, 399 F.2d 769, 773 (6th Cir. 1968); Acree v. ALPA, 390 F.2d 199, 202 (5th Cir. 1968), cert. den. 393 U.S. 852, 89 S.Ct. 88, 21 L.Ed.2d 122. A party knowingly participating in a judicial proceeding, and obtaining and accepting benefits therefrom by way of judgment to the detriment of the other party, is bound thereby and should be estopped from later challenging or derogating that judgment. 31 C.J.S. Estoppel § 115. See American Nat'l Bank v. Taussig, 255 F. 2d 765, 768 (7th Cir. 1958); St. Louis Typographical Union v. Herald Co., 402 F.2d 553 (8th Cir. 1968).

There are further reasons that those in the Meek group[4] who filed charges in 1971 should not be considered as a basis of this action by E.E.O.C. On November 10, 1972, all of these females signed an agreement amounting to a waiver and release of claims against defendant with respect to adjustments to service dates for seniority purposes. They are further estopped from pursuing any claim, and, for the reasons stated, neither should the E.E.O.C. under these circumstances be permitted to rely upon these claims re-

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[3] 47 Am.Jur.2d, Judgments, Sec. 1092.

[4] Meek, Slayton, Etheridge,* Foster, Cox, Hudson, Wade, Jeffcoat,* Roser, Scott and Local #704. (* These two are no longer employed by Kimberly-Clark.)

lating to 1965 and 1966 lay-offs. E.E.O.C. further admits in its reply to defendant's motion that the Commission did not issue a formal decision of reasonable cause in this group of charges. (p. 17) It has therefore failed to comply with administrative requirements on these charges preliminary to instituting suit thereon. We need not reach the question as to whether the Meek group of charges, or amended charges, were timely filed.

Rule 23, dealing with class actions, was amended in 1966, "in part to make it clear that civil rights suits for injunctive or declaratory relief can be brought as class actions. . . . Moreover, by their very nature, civil rights class actions almost invariably involve a plaintiff class."[5] That same authority goes on to point out that "according to traditional res judicata notions, a member of the class in a Rule 23 suit is considered to be a party by representation, and will be bound to the same extent as an actual party." (Sec. 1789). The "Meek group" were the representatives of the E.E.O.C. in a practical sense in the 1966 class action suit alleging sex discrimination, and the E.E.O.C. as a "privy" to that group of plaintiffs should not now be heard to assert a later cause of action either to undo or to obtain greater relief than was accorded to those plaintiffs under the order and judgment specifically approving the "fairness, adequacy and propriety of the proposed settlement and compromise." Insofar, therefore, as the action of the E.E.O.C. pertains to the complaining class of females effected by the 1967 judgment and order of this Court in Cause No. C-66-251, relating to the prior "lay-off of girls because of lack of work . . . not based on seniority," the defendant Kimberly-Clark's motion for

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[5] Wright & Miller, Federal Practice & Procedure, Vol. 7A, Sec. 1776.

summary judgment is granted in part.[6] Nor may the E.E.O.C. in this suit relitigate the terms of the compromise settlement entered into by the plaintiffs independently represented by competent counsel in 1967, regarding that issue or those issues.[7] The E.E.O.C. may, however, as may the individuals effected, properly assert any claim or contention that Kimberly-Clark (or the defendant Union) has not carried out its obligations under the compromise settlement effectuated in 1967. Of course, aggrieved persons, whether within or without the "Meek group" or the 26 persons receiving benefits in the 1967 case, claiming sex discrimination on the part of defendant concerning lay-offs or other activities after 1967, are not within the purview of the summary judgment awarded Kimberly-Clark. Plaintiff herein may pursue its action with regard to sex discrimination charges after 1967 without regard to a bar of res judicata. The evidence as to circumstances of the 1965 lay-off may be relevant, moreover, to a claimed pattern of sex employment discrimination.

The "Williams group" of charges, involving four females—Williams, Edmiston, Mobley and Johnston—were all filed more than four years before this action was instituted by E.E.O.C., which in 1970 found reasonable cause on these charges of sex discrimination.

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[6] The E.E.O.C. in its supplemental memorandum filed with the Court stated that the "settlement provided monetary relief to 26 persons who were effected by a November, 1965, lay-off". Those 26 persons, together with the E.E.O.C., are estopped or precluded from challenging or setting aside the terms of that 1967 compromise settlement judgment. Others, outside that class, are not so bound.

[7] United States v. Harrison County, Miss., 399 F.2d 485, 491 (5th Cir. 1968) relied upon by the E.E.O.C. sets out four conditions as to applicability of res judicata. All are present here. (1) Identity of things sued for; (2) identity of cause of action; (3) identity of persons and parties to the action; and (4) identity of quality or character in the person against whom the claim is made.

Defendant claims also that the suit by E.E.O.C. is untimely under all the circumstances, particularly with respect to the dates of filing of the individual charges.

The Equal Employment Opportunity Act of 1972 (Title VII of the Civil Rights Act of 1964) became effective March 24, 1972. All of the Williams group charges were then at this time pending for more than three years before the E.E.O.C., which then brought suit almost a year later. The E.E.O.C. may not be subject to the one year Tennessee statute of limitations on the bringing of civil rights actions as are individual plaintiffs in 42 U.S.C. § 1981 et seq. cases. United States v. Summerlin, 310 U.S. 414, 417, 60 S.Ct. 1019, 84 L.Ed. 1283 (1940). Defendant has cited no authority holding that the E.E.O.C. is similarly subject to a one year statute.

The charge of Lois Dunavant remains for consideration, since this decision has touched upon all others. The Munn charge and the Meek group of charges have been, in effect, removed from this proceeding as issues except as the circumstances may be relevant to other pertinent sex discrimination allegations. The defendant's motions have been overruled as to the Dunavant and Williams group charges unless defendant's contention with respect to interpretation of Section 706(f)(1) of the 1972 Amendment is sustained. The limitation sought to be imposed upon the E.E.O.C. by defendant has been urged upon this Court in a number of other similar E.E.O.C. actions. This particular division of the Court has until this time declined to rule on this contention in light of the sharply differing interpretations placed on this section, and the statutory scheme of the 1972 Act, by the numerous other District Courts which have considered the issue. We are particularly mindful of Judge Robert McRae's decision in Civil No. C-73-283, E.E.O.C. v. U. S. Industries, dated January 3, 1974, ruling in favor of plaintiff's position.

For purposes of this case, and because of its peculiar circumstances, the Court is called upon to rule upon defendant's motion for summary judgment based upon this ground. First of all, the legislative history of the Act makes it unclear as to what Congress intended in amending the Act. The Conference Committee's "Section-by-Section Analysis," Legislative History of the Equal Employment Act of 1972, p. 1847, makes reference to what an aggrieved person may do under 706(f)(1) so as not to endure "lengthy delays if the Commission or Attorney General does not act with due diligence and speed." The Commission's action under that section is to be taken within 180 days from the filing of the charge. Subsection (e) provides that a charge may be filed within 180 days after the alleged unlawful employment practice occurred. Thus, if defendant's contention is correct, nearly a year may expire after an act of discrimination before suit were required to be instituted by the E.E.O.C. The Sixth Circuit has previously construed time requirements of the 1964 Act strictly in Goodman v. City Products, 425 F.2d 702 (6th Cir. 1970).

The first reported case to deal with this question was Judge Tjoflat in the Middle District of Florida.[8] He ruled, in effect, that the Commission must commence an action after filing of a charge, (and the giving of notice, investigation, determination of reasonable cause and attempted reconciliation) within 180 days thereafter. Thereafter, the Northern District of California interpreted the 180 day requirement as "only a period in which a private party must wait while the Commission attempts to conciliate." EEOC v. Bartenders International Union, 369 F.Supp. 827 (N.D. Calif. 1973). Chief Judge Jones in EEOC v. Cleveland Mills Co., 364 F.Supp. 1235, 1238 (W.D. N.C., 1973), how-

[8] EEOC v. Container Corp. of America, 352 F.Supp. 262 (D.C. 1972).

ever, held that this section "contains a limitation upon the Commission's power or authority to bring suit. It is not a statute of time limitation in the ordinary sense," and therefore suit had to be brought within the 180 day period in which it was given its new 1972 authority. None of these cases cited any other as a precise basis for its decision. Again, without citation of authority or precedent,[9] another District Court reached a result contrary to *Container Corp.* and *Cleveland Mills* holding that "after the 180th day [in question] (if notice is given to the aggrieved employee) both the E.E.O.C. and the aggrieved employee may sue." On the other hand, in 1973, a Virginia District Judge held that the 1972 amendment under consideration meant that the "E.E.O.C. is now given 180 days to decide whether to commence suit itself or to issue a right to sue letter.[10]"

One of the first cases to cite any previous decisions or the rationale thereof on this question as a basis of its holding was E.E.O.C. v. Duff Brothers, 364 F.Supp. 405 (E.D. Tenn. 1973). That Court found E.E.O.C. v. Bartenders Int'l Union to be correct in refusing to apply any "such restrictive interpretation upon the authority of the Commission to initiate civil actions." There was also agreement with the rationale of *Duff Brothers, supra,* in E.E. O.C. v. Eagle Iron Works, 367 F.Supp. 817 (S.D. Iowa, 1973), although no other case law authority was cited as a basis for its decision. Judge Hancock was the first, from the cases noted by this Court, to analyze the varying and diverse decisions of other District Courts on this

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[9] E. E. O. C. v. Mobil Oil Corp., 362 F.Supp. 786 (W.D.Mo. 1973). Judge Collinson noted *Cont. Corp., supra* and *Bartenders Local #41, supra,* but on other issues.

[10] Gilbert v. Gen. Elec. Co., 5 E. P. D. ¶ 8663 (E.D.Va.1973). To the same effect see E. E. O. C. v. Firestone Tire & Rubber Co., 366 F.Supp. 273 (D.C.Md.1973).

question in E.E.O.C. v. L & N R.R. Co.[11] His decision was to the effect that the "sole time within which the Commission may file suit on its own behalf" is the time period "from the 30th day after a charge is filed until the 180th day after the charge is filed." That opinion relied upon *Cleveland Mills, supra,* and disagreed with both *Bartenders Int'l Union* and *Mobil Oil, supra,* making particular reference to the Section 706(f)(1) statutory scheme and the subsequent right of the Commission to intervene. The judge there was not impressed with the E.E.O.C. contention that a defendant might be delayed indefinitely "in a state of suspended animation" since it had "no time limitations" placed on its right to bring suit.

E.E.O.C. v. L & N. R.R., *supra,* was followed closely by a well-reasoned opinion reaching the same result in E.E. O.C. v. Union Oil Co. of Calif., 369 F.Supp. 579 (N.D. Ala. 1974). Judge Pointer in the later case analyzed the decisions of eight other District Courts[12] in concluding that the 180 day period in the statute under consideration was a statute of limitations upon the E.E.O.C.'s right to sue. Among the reasons given for this conclusion which seem logical and reasonable in light of the uncertainty of the legislative background are these:

(1) Such a time restriction (180 days) is a part of the statutory scheme of controlled time frames.

(2) "A time limitation is needed to assure *speedy disposition* of charges of discrimination." (emphasis ours).

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[11] 368 F.Supp. 633 (N.D.Ala.1974).

[12] He referred to *L & N R. R., Duff Bros., Mobil Oil, Bartenders Int'l Union, Eagle Iron Works, U. S. Industries, Cleveland Mills,* and E. E. O. C. v. Hickey-Mitchell Co., 372 F.Supp. 1117 (E.D. Mo., 1972).

(3) "A time limitation will not hinder eradication of employment discrimination" since new charges may be filed or an aggrieved individual may sue in his own right and on a class action basis.[13]

This Court recognizes the counter-arguments advanced by the E.E.O.C. and by nearly one-half of the courts dealing with this problem. They, too, have merit, but an unlimited right to sue in light of other time specifications in the statute appears beyond the scope of the Commission's intended authority, especially since it may intervene in important cases in a private suit under Title VII even beyond this 180 day time frame. It may remain for Congress to clarify this provision in light of its evident uncertainty. This Court, with some trepidation in view of the split of authority, rules that defendant's motion for summary judgment should be granted.

The granting of defendant's motion, however, is coupled with the further ruling that all discovery matters accomplished in this cause by plaintiff from defendant Kimberly-Clark will be admissible, if relevant or material, to any other causes of action in this Court for racial or sex discrimination against Kimberly-Clark under Title VII of the Civil Rights Act, as amended.

This 27th day of March, 1974.

/s/ HARRY W. WELLFORD
United States District Court Judge

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[13] "Although the 1972 amendment to Title VII empowers the Commission to bring its own actions, the private right of action remains an essential means of obtaining judicial enforcement of Title VII. 42 U.S.C. § 2000e-5(f)(1)." Alexander v. Gardner-Denver Co., 415 U.S. 36, 45, 94 S.Ct. 1011, 1018, 39 L.Ed.2d 147 (1974).

No. 74-1558

United States Court of Appeals
For the Sixth Circuit

Equal Employment Opportunity Commission,
Plaintiff-Appellant,
v.
Kimberly-Clark Corporation,
Defendant-Appellee.

ORDER

[Filed April 23, 1975, John P. Hehman]

Before: CELEBREZZE and MILLER, Circuit Judges and O'SULLIVAN, Senior Circuit Judge.

Appellee having filed a petition for rehearing in banc and no judge of the Court having requested a rehearing in banc, the motion has been referred to the panel which heard the original appeal. The Court has considered the petition for rehearing and concludes that no issues are raised therein which were not considered upon the original submission.

The Court being advised, it is ORDERED that petition be, and it hereby is, denied.

ENTERED BY ORDER OF THE COURT
JOHN P. HEHMAN
Clerk

STATUTES INVOLVED

Section 706 (b) as amended by the 1972 Act

Sec. 706 (b). Whenever a charge is filed by or on behalf of a person claiming to be aggrieved, or by a member of the Commission, alleging that an employer, employment agency, labor organization, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs, has engaged in an unlawful employment practice, the Commission shall serve a notice of the charge (including the date, place and circumstances of the alleged unlawful employment practice) on such employer, employment agency, labor organization, or joint labor-management committee (hereinafter referred to as the "respondent") within ten days, and shall make an investigation thereof. Charges shall be in writing under oath or affirmation and shall contain such information and be in such form as the Commission requires. Charges shall not be made public by the Commission. If the Commission determines after such investigation that there is not reasonable cause to believe that the charge is true, it shall dismiss the charge and promptly notify the person claiming to be aggrieved and the respondent of its action. In determining whether reasonable cause exists, the Commission shall accord substantial weight to final findings and orders made by State or local authorities in proceedings commenced under State or local law pursuant to the requirements of subsections (c) and (d). If the Commission determines after such investigation that there is reasonable cause to believe that the charge is true, the Commission shall endeavor to eliminate any such alleged unlawful employment practice by informal methods of conference, conciliation, and persuasion. Nothing said or done during and as a part of such informal endeavors

may be made public by the Commission, its officers or employees, or used as evidence in a subsequent proceeding without the written consent of the persons concerned. Any person who makes public information in violation of this subsection shall be fined not more than $1,000 or imprisoned for not more than one year, or both. The Commission shall make its determination on reasonable cause as promptly as possible and, so far as practicable, not later than one hundred and twenty days from the filing of the charge or, where applicable under subsection (c) or (d), from the date upon which the Commission is authorized to take action with respect to the charge. [As amended March 24, 1972, P. L. 92-261, Title VII, 86 Stat. 104, 42 U. S. C. § 2000e-5(b).]

Section 706 (f) (1) as amended by the 1972 Act

Sec. 706 (f)(1). If within thirty days after a charge is filed with the Commission or within thirty days after expiration of any period of reference under subsection (c) or (d), the Commission has been unable to secure from the respondent a conciliation agreement acceptable to the Commission, the Commission may bring a civil action against any respondent not a government, governmental agency, or political subdivision named in the charge. In the case of a respondent which is a government, governmental agency, or political subdivision, if the Commission has been unable to secure from the respondent a conciliation agreement acceptable to the Commission, the Commission shall take no further action and shall refer the case to the Attorney General who may bring a civil action against such respondent in the appropriate United States district court. The person or persons aggrieved shall have the right to intervene in a civil action brought by the Commission or the

Attorney General in a case involving a government, governmental agency, or political subdivision. If a charge filed with the Commission pursuant to subsection (b) is dismissed by the Commission, or if within one hundred and eighty days from the filing of such charge or the expiration of any period of reference under subsection (c) or (d), whichever is later, the Commission has not filed a civil action under this section or the Attorney General has not filed a civil action in a case involving a government, governmental agency, or political subdivision, or the Commission has not entered into a conciliation agreement to which the person aggrieved is a party, the Commission, or the Attorney General in a case involving a government, governmental agency, or political subdivision, shall so notify the person aggrieved and within ninety days after the giving of such notice a civil action may be brought against the respondent named in the charge (A) by the person claiming to be aggrieved or (B) if such charge was filed by a member of the Commission, by any person whom the charge alleges was aggrieved by the alleged unlawful employment practice. Upon application by the complainant and in such circumstances as the court may deem just, the court may appoint an attorney for such complainant and may authorize the commencement of the action without the payment of fees, costs, or security. Upon timely application, the court may, in its discretion, permit the Commission, or the Attorney General in a case involving a government, governmental agency, or political subdivision, to intervene in such civil action upon certification that the case is of general public importance. Upon request, the court may, in its discretion, stay further proceedings for not more than sixty days pending the termination of State or local proceedings described in subsection (c) or (d) of this section or further efforts of the Commission to obtain voluntary compliance. [As amended March 24, 1972, P. L. 92-261, Title VII, 86 Stat. 105, 42 U. S. C. § 2000e-5(f)(1).]

Section 14 of the 1972 Act.

Sec. 14. The amendments made by this Act to section 706 of the Civil Rights Act of 1964 shall be applicable with respect to charges pending with the Commission on the date of enactment of this Act and all charges filed thereafter. [Act of March 24, 1972, P. L. 92-261, 86 Stat. 103.]

Section 706 (d) of the 1964 Act

Sec. 706 (d). A charge under subsection (a) shall be filed within ninety days after the alleged unlawful employment practice occurred, except that in the case of an unlawful employment practice with respect to which the person aggrieved had followed the procedure set out in subsection (b), such charge shall be filed by the person aggrieved within two hundred and ten days after the alleged unlawful employment practice occurred, or within thirty days after receiving notice that the State or local agency has terminated the proceedings under the State or local law, whichever is earlier, and a copy of such charge shall be filed by the Commission with the State or local agency. [P. L. 88-352, Title VII, 78 Stat. 260.]

EEOC REGULATIONS INVOLVED

Authority: The provisions of this Part 1601 are issued under sec. 713, 78 Stat. 265; 42 U.S.C. § 2000e-12.

Source: The provisions of this Part 1601 appear at 30 F.R. 8401, July 1, 1965, unless otherwise noted.

§ 1601.1 **Purpose.**

The regulations set forth in this Part 1601 contain the procedures established by the Equal Employment

Opportunity Commission for carrying out its responsibilities in the administration and enforcement of Title VII of the Civil Rights Act of 1964. Based upon its experience in the administration of the Act and upon its evaluation of suggestions and petitions for amendments submitted by interested persons in accordance with § 1601.32, the Commission may from time to time amend and revise these procedures.

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Procedure Following Filing of Charge

[Note: Amendments made 35 F.R. 3163, February 19, 1970 re charges shall be applicable with respect to charges presently pending in which the investigation had not been completed by February 19, 1970; 35 F.R. 10110, June 19, 1970.][1]

§ 1601.19 **Dismissal of charge.**

Where the allegations of a charge on its face, or as amplified by the statements of the charging party to the Commission, disclose that the charge is not timely filed or otherwise fails to state a valid claim for relief under Title VII, the Commission, through the Director of the Field Office where the charge is lodged, may dismiss the charge without further action. Charging party and respondent where the charge has been served, shall be notified in writing of the disposition of the charge together with the reasons therefor. Objections to such dismissal will be considered by the Commission, when filed in writing at its headquarters in Washington, D.C., within twenty (20) days of receipt of the Field Director's notice of dismissal.

[35 F.R. 3163, Feb. 19, 1970]

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[1] 118 Cong. Rec. 718 (Jan. 21, 1972).

§ 1601.19a **Field Director's findings of fact.**

Upon completion of an investigation, the Field Director will cause to be prepared and served upon the parties his findings of fact in the case, which shall contain findings of fact and a summary of the evidence upon which such findings are based.

[35 F.R. 3163, Feb. 19, 1970, as amended at 35 F.R. 10110, June 19, 1970]

§ 1601.19b **Exceptions to Field Director's findings of fact.**

(a) Within fifteen (15) days, or within such further period as the Field Director may allow, from the date of service of the Field Director's findings of fact, the parties may file such exceptions to the Field Director's findings of fact, objections, briefs and evidence in support thereof as they desire. When requested by a person not represented by counsel, assistance in the preparation of exceptions to the Field Director's findings of fact will be provided by personnel of the Field Office as deemed practicable by the Field Director.

(b) Each exception shall:

(1) Set forth the specific procedure, finding, policy, or interpretation of law or fact to which objection is taken;

(2) Identify any and all parts of the Field Director's findings of fact to which exception is taken by reference to the precise page and paragraph of the determination;

(3) State the grounds for the exception, including the citation to any authority relied upon, and a de-

scription of any factual circumstance or interpretation of facts upon which reliance is placed.

(c) Any exception to findings which is not specifically urged may be deemed waived. Any exception which fails to comply with the requirements set forth in paragraph (b) of this section may be disregarded.

(d) Within five (5) days from the date of this filing of exceptions, or within such further period as the Field Director allows, cross exceptions may be filed in the manner set forth in paragraph (b) of this section.

(e) All such exceptions and cross exceptions shall be accompanied by proof of service on all parties. The Field Director may perfect service as deemed practicable.

[35 F.R. 3163, Feb. 19, 1970]

§ 1601.19c **Predecision procedure.**

Following the issuance of the Field Director's findings of fact and the receipt of exceptions if any, the Field Director may invite the parties to engage in settlement discussions. Should settlement be reached, the terms thereof will be reduced to writing and shall be signed by the parties and, if approved by the Field Director, forwarded to the Commission for approval and such further action as may be appropriate. In the event no settlement is attempted or reached, the Field Director shall, upon consideration of exceptions, objections, briefs and evidence submitted under § 1601.19b, either cause the charges to be reinvestigated, issue his redetermination of fact based thereon, or forward

the full investigation file to the Commission for determination as to reasonable cause.

[35 F.R. 3163, Feb. 19, 1970]

§ 1601.19d **Determination as to reasonable cause.**

(a) Following receipt of the full investigative file, the Commission shall consider and decide the issues presented and serve a copy of its decision upon the parties. If the Commission determines that the charge fails to state a valid claim for relief under Title VII, or that there is not reasonable cause to believe that a charge is true, the Commission shall dismiss the charge. Where, however, the Commission determines that there is reasonable cause to believe that an unlawful employment practice has occurred or is occurring, it shall endeavor to eliminate such practice by informal methods of conference, conciliation, and persuasion.

(b) The Commission shall promptly notify the charging party, the respondent and, in the case of a charge filed under § 1601.10, the person aggrieved, if known, of its determination under paragraph (a) of this section. The Commission's determination is final when issued; therefore, requests for reconsideration will not be granted. The Commission may, however, on its own motion, reconsider its determination at any time and, when it does so, the Commission shall promptly notify the charging party, the respondent and, in the case of a charge filed under § 1601.10, the person aggrieved, if known, of its intention to reconsider its determination, and of its subsequent decision on reconsideration.

(c) Where a member of the Commission has filed a charge under § 1601.10, he shall not participate in the determination in that case.

(d) Notwithstanding any other provision in this part, where the allegation of a charge on its face, or as amplified by the statements of the charging party to the Commission, disclose that the charge is not timely filed or otherwise fails to state a valid claim for relief under Title VII, the Commission may dismiss the case without further action, but it shall notify the charging party, and the respondent if the charge has been served, in writing of its disposition of the case and the reasons therefor. The Commission's dismissal of a charge becomes final when issued; therefore, requests for reconsideration will not be granted. The Commission may, however, on its own motion, reconsider such dismissal at any time and, if it does so, the Commission shall promptly notify the charging party, and the respondent if the charge has been served, of its decision.

[35 F.R. 3163, Feb. 1970]

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Procedure to Rectify Unlawful Employment Practices

§ 1601.22 Conciliation; settlements.

In conciliating a case in which a determination of reasonable cause has been made, the Commission shall attempt to achieve a just resolution and to obtain assurances that the respondent will eliminate the unlawful employment practice and take appropriate affirmative action. Disposition of a case pursuant to this section shall be in writing, and notice thereof shall be sent to the parties. Proof of compliance with Title VII will be obtained by the Commission before the case is closed.

[31 F.R. 10270, July 29, 1966]

§ 1601.23 Refusal of respondent to cooperate.

Should a respondent fail or refuse to confer with the Commission or its representative, or fail or refuse to make a good faith effort to resolve any dispute, the Commission may terminate its efforts to conciliate the dispute. In such event, the respondent shall be notified promptly, in writing, that such efforts have been unsuccessful and will not be resumed except upon the respondent's written request within the time specified in such notice.

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Procedure After Failure of Conciliation

§ 1601.25 Notice to respondent and aggrieved person.

In any instance in which the Commission is unable to obtain voluntary compliance as provided by Title VII it shall so notify the respondent and the aggrieved person or persons. Notification to an aggrieved person shall include:

(a) A copy of the charge.

(b) A copy of the Commission's determination of reasonable cause.

(c) Advice concerning his right to proceed in court under section 706(e) of Title VII.

§ 1601.25a Processing of cases; when notice issues under § 1601.25.

(a) The time for processing all cases is extended to sixty (60) days except insofar as proceedings may be earlier terminated pursuant to §1601.19d.

(b) Notwithstanding the provisions of paragraph (a) of this section, the Commission shall not issue a notice pursuant to §1601.25 prior to a determination under § 1601.19d, or where reasonable cause has been found, prior to efforts at conciliation with respondent, except as provided in paragraph (c) of this section.

(c) At any time after the expiration of sixty (60) days from the date of the filing of a charge, or upon dismissal of the charge at any stage of the proceedings, or upon the expiration of the time for filing objections to dismissal by the Field Director pursuant to § 1601.19, the charging party or the respondent may demand in writing that a notice issue pursuant to § 1601.25, and the Commission shall promptly issue such notice, with copies to all parties.

(d) Issuance of notice pursuant to paragraph (c) of this section shall suspend further Commission proceedings unless the Field Director determines that it is in the public interest to continue such proceedings, or unless, within twenty (20) days after receipt of such notice, a party requests the Field Director, in writing, to continue to process the case.

[35 F.R. 3164, Feb. 19, 1970; 35 F.R. 10110, June 19, 1970]

In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-119

KIMBERLY-CLARK CORPORATION, PETITIONER

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION IN OPPOSITION

The Equal Employment Opportunity Commission brought this action in the United States District Court for the Western District of Tennessee. The complaint, which was based on a variety of charges filed with the Commission over a period of five years, alleged that petitioner discriminated on the basis of sex and race in many of its employment practices and policies.

The district court granted petitioner's motion for summary judgment (Pet. App. A24-A35). It ruled that the complaint was untimely, that portions of it were not properly supported by administrative charges, and that another portion could not be maintained because a private suit had previously been filed by the charging party.

The court of appeals reversed in an exhaustive opinion on which we principally rely (Pet. App. A1-A23). Its decision is correct, and further review is not warranted.

1. Petitioner contends (Pet. 10-11) that the prior filing of a private action with respect to a charge precludes the Commission from bringing its own action with respect to matters growing out of the same charge. As the court of appeals correctly held (Pet. App. A19-A22), however, neither the Act nor its legislative history supports that contention. Even if it were assumed that Congress meant to foreclose the filing of a separate action by the Commission "when the EEOC's action parallels that of the private party, raising no substantially different issues and seeking no relief other than for the private party," that would not mean that a separate action is precluded when, as in the present case, "[t]he EEOC's suit encompasses allegations that extend beyond [the] private complaint, both in the scope of concern and in the extent of relief sought" (*id.* at A22). In those circumstances, "it would not be duplicitous to allow both * * * suits to proceed, though consolidation might be thought appropriate" (*ibid.*).

The Eighth Circuit's decision in *Equal Employment Opportunity Commission* v. *Missouri Pacific R.R. Co.*, 493 F.2d 71, took a different view of the matter, but the conflict is one more of form than of substance. That court held that, "once the charging party has filed suit pursuant to a 'right to sue' notice, the Commission is relegated to its right of permissive intervention" (493 F.2d at 75). The panel also made clear, however, that it expected the district court to "permit intervention and enlargement of the scope of the action by the Commission if necessary to the rendering of full and complete justice" (*ibid.*).

The practical result in *Missouri Pacific*, therefore, was essentially the same as that here. The Sixth Circuit in the present case contemplated the filing of a separate action by the Commission which would be consolidated with the private action; the Eighth Circuit contemplated the Commission's intervention in the private action and an appropriate broadening of the scope of the proceeding to accommodate the Commission's claims. Although we agree with the Sixth Circuit that the proper procedure "is not to expand the concept of intervention beyond its normal meaning, but to allow the EEOC to bring suit based on the findings that its investigation warrants" (Pet. App. A23, n. 15), either procedure would permit the Commission to pursue its complaint without subjecting the defendants to duplicative judicial proceedings. So long as intervention is freely permitted in the Eighth Circuit, and so long as the proceedings are properly "enlarge[d]" (493 F.2d at 75) to accommodate the Commission's action, the abstract disagreement between the two courts of appeals need not be resolved by this Court.

2. Petitioner argues that the Commission is precluded from filing suit "by res judicata or collateral estoppel where a charging party has sued and the suit has been settled or adjudicated on the merits" (Pet. 11). The court of appeals correctly held (Pet. App. A17-A19), however, that the Commission was not privy to the settlement agreement involved here, did not agree to it, and accordingly "is not barred by the doctrine of res judicata from basing its complaint on charges of discrimination which it never agreed to settle" (*id.* at A18). "[T]he EEOC sues to vindicate the public interest, which is broader than the interests of the charging parties" (*ibid.*), and it would be inconsistent with the Act's enforcement scheme to foreclose the Commission from vindicating that broader

public interest merely because the private parties have settled their own charges against the defendant in a way that is satisfactory to them.[1]

3. Petitioner contends (Pet. 13-16) that the Commission's action is barred because it failed to notify petitioner that conciliation had failed with respect to one set of charges on which the Commission's complaint was based. The Commission, however, had attempted to conciliate other groups of similar sex discrimination charges and had notified petitioner that conciliation had failed with respect to those charges. As the court of appeals correctly found, petitioner "was apprised of the imminence of suit concerning sex discrimination charges prior to [the Commission's] suit" and "suffered no significant prejudice by not being notified of the failure of conciliation on the 'Williams group' of charges as well, since these charges concerned substantially identical issues of company practices" (Pet. App. A16).

Thus, while "[t]he EEOC should, of course, follow its own procedures as it conciliates charges" (*ibid.*), the failure to give notice on the one set of charges here was harmless error. As the court of appeals stated, "[w]hen an agency neglects to follow a procedural rule but its failure inflicts no significant injury on the party

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[1]Moreover, as the court of appeals stated, the settlement related only to one group of administrative charges. The Commission's complaint was also based on two other groups of similar charges, which themselves "form an adequate basis for an EEOC suit alleging sex discrimination by [petitioner]" (Pet. App. A18). For the same reason, the court of appeals correctly held that there is no need to consider here whether the Commission's failure to make a finding of reasonable cause with respect to the charges that were settled precludes the Commission's reliance on them in this action (see Pet. App. A19, n. 13).

entitled to observance of the rule, the error does not prevent further administrative or judicial action" (*id.* at A16-A17).[2]

4. Petitioner argues (Pet. 16-18) that the 1972 Amendments to Title VII of the Civil Rights Act of 1964, 78 Stat. 259, which for the first time authorized the Commission to file a civil action when conciliation has been unsuccessful, are inapplicable to the charges in the present case because the charges were not "pending with the Commission on the date of enactment" within the meaning of Section 14 of the Equal Employment Opportunity Act of 1972, 86 Stat. 113. The contention is that the "charges," having been investigated and given case numbers at the time the 1972 Act took effect, had passed from the status of "charges" to that of "cases."

As the court of appeals correctly stated, however, petitioner's "argument is an exercise in linguistic sophistry" (Pet. App. A5). The distinction between a "charge" and a "case" under Commission regulations "is purely for internal administrative purposes and is clearly not controlling when considering what Congress meant by 'charges' in enacting the 1972 amendments" (*id.* at A5, n. 3). "There is no indication in the legislative history that Congress was making the 'charge-case' distinction in applying the 1972 amendments to pending 'Charges' " (*id.* at A5), and there is no reason why it would have wished to do so.

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[2] *Equal Employment Opportunity Commission* v. *Hickey-Mitchell Co.*, 507 F.2d 944 (C.A. 8), relied upon by petitioner (Pet. 12, 15), is not in conflict with the present decision. There were no parallel charges involved in *Hickey-Mitchell*, and the court of appeals there, in contrast to the court here, was unable to "conclude that the Employer was not prejudiced" by the failure to give notice (507 F.2d at 948). The different results simply reflect the different records in the two cases.

5. Petitioner finally contends (Pet. 19-21) that the Commission's suit is barred because it was not filed within 180 days from the filing of the administrative charges or within the one-year state statute of limitations. The court of appeals addressed both issues exhaustively (Pet. App. A6-A15) and correctly concluded that "[t]he EEOC is not barred from basing a complaint on a charge filed more than 180 days prior to the EEOC's suit" (*id.* at A14) and that, "[i]n the absence of congressional intent to apply state statutes of limitations, such restrictions do not apply to the EEOC" (*id.* at A14-A15).

As petitioner acknowledges (Pet. 20), its contention with respect to the 180-day limitation period has been rejected by every court of appeals that has considered the issue. *Equal Employment Opportunity Commission* v. *Cleveland Mills Co.*, 502 F.2d 153 (C.A. 4), certiorari denied, 420 U.S. 946; *Equal Employment Opportunity Commission* v. *Louisville and Nashville R. Co.*, 505 F.2d 610 (C.A. 5), certiorari denied, October 6, 1975, No. 74-1294; *Equal Employment Opportunity Commission* v. *E.I. duPont de Nemours & Co.*, C.A. 3, No. 74-1677, decided May 9, 1975; *Tuft* v. *McDonnell Douglass Corp.*, C.A. 8, No. 74-1890, decided May 27, 1975. We fully stated our views with respect to this issue in our Memorandum in Opposition to the petition for a writ of certiorari in *Cleveland Mills* (No. 74-607), and we rely here on that Memorandum.[3]

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[3]We are sending a copy of the Memorandum to petitioner's counsel.

With respect to the state statute of limitations issue, petitioner relies (Pet. 19) on *Equal Employment Opportunity Commission* v. *Griffin Wheel Co.*, 511 F.2d 456 (C.A. 5), which held that insofar as a complaint filed by the Commission "seeks recovery of back pay it is private and not public in nature and is subject to the [applicable state] statute of limitations" (511 F.2d at 459). That case, however, was decided by the Fifth Circuit prior to this Court's decision in *Albemarle Paper Co.* v. *Moody*, Nos. 74-389, *et al.*, June 25, 1975, in which the Court stated that back pay awards have "an obvious connection with" (slip op. 11) the central objective of Title VII to eradicate employment discrimination throughout the economy. "It is the reasonably certain prospect of a backpay award," the Court stated, that provides employers an "incentive to shun practices of dubious legality" (*ibid.*). Now that this Court has identified the public importance of back pay relief under Title VII, the Fifth Circuit may have occasion to reconsider its holding in *Griffin Wheel.*

In any event, this is not an appropriate case in which to resolve the alleged conflict between the courts of appeals on this issue. The Fifth Circuit's opinion in *Griffin Wheel* stated that, in determining the date on which the cause of action accrued for purposes of the applicable statute of limitations, the court must determine "the date of the last act of discrimination" (511 F.2d at 459). Since the Commission's complaint in this case alleged continuing violations by petitioner, it was timely filed with respect to the back pay request even under the *Griffin Wheel* standard.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

ABNER W. SIBAL,
General Counsel,

JOSEPH T. EDDINS,
Associate General Counsel,

BEATRICE ROSENBERG,
CHARLES L. REISCHEL,
BETH L. DON,
Attorneys,
Equal Employment Opportunity Commission.

OCTOBER 1975.

DOJ-1975-10